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IN THE

Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,
Petitioners,

v.

FARMERS GROUP, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court properly considered the allegations contained within the complaint in the light most favorable to the nonmoving party for purposes of a Fed. Rule of Civ. Proc. R. 12(b)(6) dismissal, when the court clearly ignored paragraphs one through seven (1-7), of the second amended complaint (Appendix F p. 56a-58a) (Order of 11-20-03 Appendix D p. 16a-20a).

2. Whether the cause of action (and statute of limitations) commenced upon the discovery of the frauds concealed by the third party insurance company; and if not, Whether equitable tolling should apply to the state law statute of limitations when a third party successfully concealed the fraud; and as a result, precluded the knowledge of the cause of action against the third party until said discovery?

3. Whether the allegations that, "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint (Appendix F p. 59a-60a and 63a-65a) contained a sufficient allegation of "ongoing pattern or practice" and "open continuity" for purposes of RICO in order to survive a 12(b)(6) Motion to Dismiss?

LIST OF PARTIES TO THE PROCEEDINGS

The *Petitioners* in this action are James Erikson and Patrick Kilgallen.

The *Respondents,* In addition to Farmers Group, Inc. and affiliated companies, The Farmers Insurance Group of Companies and affiliated companies were also named as defendants in the district court. The parties in the caption were parties on appeal to the Tenth Circuit. The parent company of Defendant Farmers Group, Inc., is Zurich Financial Services, whose stock is traded on the London and Zurich stock exchanges. Zurich Financial Services owns more than 10% of the stock of Farmers Group, Inc., according to the corporate disclosure statement filed of record with the district court, dated April 24, 2003 and was not named as a party.

Only the parties named in the caption were parties on appeal to the Tenth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, James Erikson and Patrick Kilgallen, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinions of the court of appeals denying Petitioners' Appeal, 151 Fed.Appx. 672 (10th Cir. 2005), Petition for Rehearing En Banc and the order of the district court granting Defendants' motion to dismiss (Appendix B p. 3a and Appendix D p. 14a-25a) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on October 18, 2005. A timely petition for rehearing was filed on November 29, 2005. The petition for rehearing was denied and entered on December 12, 2005. On March 16, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including May 11, 2006. The jurisdiction of This Court is invoked under 28 U.S.C. § 1254(1).

CODES AND REGULATIONS INVOLVED

The relevant provisions of the Oklahoma Statutes, 12 Okl. St. § 95 (3), and are set forth in the appendix to this petition at Appendix H p. 78a.

12 Okl. St. § 2004.1
12 Okl. St. § 3226
43A Okl. St. § 1-109
18 U.S.C. § 1961(5)
18 U.S.C. § 3575(e)

STATEMENT OF THE CASE

Petitioners were involved in a "fender-bender" type accident in 1997 and suffered relatively minor personal injuries. Suit was timely filed against the Tortfeasor (Dana E. Davis) in a state court personal injury action, claiming inter alia, injuries restricted to head, neck, back, arm and blood pressure. The Tortfeasor was insured and represented by several 'in-house' attorneys employees of the Tortfeasor's insurance company, Farmers Group, Inc., the Appellee herein. (The insurance company was not named as a party to the state court personal injury action and Appellants had no known cause of action against said insurance company at that point). The insurance company, Farmers, is the third largest Personal Lines Property & Casualty insurance group conducting the business of insurance throughout the country.

During the state court personal injury trial, the insurance company attorney made reference to Petitioners' confidential medical information in open court by way of cross-examination but not by way of introduction into evidence. Petitioners' objections to the irrelevant medical references were overruled by the state trial court. The tortfeasor prevailed at the state court trial and the subsequent appeal to the Oklahoma Civil Court of Appeals.

Subsequent to the conclusion of the state court personal injury trial, on August 14, 2000, Appellant James Erikson received a single fax copy of a previously unknown letter sent to his medical provider from Farmers Group of Insurance Companies which demanded all medical records (every page) of Mr. Erikson. The letter was on letterhead from Dobbs and Middleton, "not a partnership," and "Employees of the Litigation Department of the Farmers Insurance Group of Companies," (according to the Farmers Insurance letterhead on which the letter was printed), representing that due to a state court order waiving medical privilege, Farmers and their attorneys were entitled to all medical records, not restricted in any way. At this point, Appellant Erikson notified his attorney of his discovery and state court subpoenas were issued and served upon the tortfeasor (Ms. Davis) and the insurance company attorneys (Dobbs and Middleton) as required by Oklahoma's subpoena statute. 12 O.S. § 2004.1 (B)(1).

Subsequently, on or about September 19, 2000, after a second subpoena was served upon the insurance company's attorneys, the insurance company attorneys reluctantly disclosed some 56 letters (apparently a form letter still used to this day) developed and sent out by the insurance company staff, which were sent to all or most of the Petitioners' medical providers through U.S. Mail and/or over telephone wires/facsimile transmissions during an unknown time period, which had been sent out without notice to the state

court or Petitioners. (In Oklahoma State Court, parties are required to be timely served notice of subpoenas. All 56 letters to the medical providers sent by the insurance company represented that the insurance company was entitled to "all medical records (every page)." Further, the recipients of the letters were threatened with being subpoenaed to testify at the state court trial if the records were not provided. The letters in possession of the Appellants appear to have been sent by one of many secretaries of the law firm, on behalf of the insurance company employees and attorneys, as a matter of regular policy and practice by the insurance company against all Plaintiffs who claim personal injuries against parties insured by Farmers in a law suit. It is unknown whether these were all letters sent by the insurance company, as all letters are held by the insurance company and no discovery was conducted after the insurance company's 12(b)(6) motion to dismiss was filed. Apparently, (at least in this case), the insurance company has a wide spread and ongoing pattern and practice of exploiting the confidential medical records against the litigants procured in secret and in violation of medical privacy, as a means of profiting by collecting insurance premiums and avoiding paying claims.

On August 14, 2002, exactly two years after the discovery of the first fraudulent letter discovered by James Erikson and well within the RICO four year statute of limitations, both Patrick Kilgallen and James Erikson filed their complaint at the Western District of Oklahoma against the Defendants. Appellants relied on Oklahoma's two-year statute of limitations which clearly and unambiguously spells out that the statute of limitations commences upon the discovery of fraud. "It is established that the two-year limitation period in § 95 Third will commence to run when the claim accrues, and the claim accrues when a litigant first could have maintained his claim to a successful conclusion." See *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980). (*See also* In re 1973 John Deere 4030 Tractor, 1991 OK 79,

816 P.2d 1126, 62 OBJ 2437 (Okla. 1991)). However, unlike the victim in 1973 John Deere Tractor where the stolen property was restored, once the Petitioners' medical privilege was breached, the Petitioners' medical confidentiality cannot be restored.

The Defendant filed a FRCP R. 12(b)(6) Motion to dismiss which was granted by the district court for exceeding Okla homa's two year statute of limitations against the invasion of privacy related state tort claims. The court ruled that the RICO claim did not allege an ongoing pattern of racketeering activity and could not withstand a 12(b)(6) motion and dismissed the case in its entirety, apparently disregarding paragraph 1 of the Second Amended Complaint which clearly and unambiguously alleged: "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint Appendix F p. 56a.

Petitioners timely filed an appeal with the Tenth Circuit which affirmed and essentially adopted the opinion of district court, affirming the district court's holding that Appellants knew of their injury at the time of the state court trial. Neither of the two cases cited by the lower courts involved a justiciable concealment of the cause of action by the tort-feasor as applies in Oklahoma. Additionally, the Petitioners timely petitioned for Rehearing En Banc but was denied by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit in this case—a decision that is squarely contrary to a litiney of well established decisions of This Court requiring that *Federal Rule of Civil Procedure 12(b)(6)* motions to dismiss must be treated in the light most favorable to the nonmoving party. (See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 103 P.U.R.

4th 513, 109 S.Ct. 2893, 106 L.Ed.2d 195, 57 USLW 4951, RICO Bus.Disp.Guide 7237 U.S.Minn. Jun 26, 1989; *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), 104 S.Ct. 2229, 81 L.Ed. 2d 59; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This case presents an opportunity to clear up any remaining question of what is to be considered as true or favorable to the nonmoving party in a FRCP R. 12(b)(6) motion to dismiss.

The district court and affirmed by the Tenth Circuit, held that Oklahoma's two-year statute of limitations ran on the Petitioners' state law claims one and a half (1½) months prior to filing their complaint (June 28, 2002). The court also found that "For purposes of the Motion to Dismiss, the court accepts the following "General Allegations" of the Second Amended Complaint as true (paragraph numbering as in original): 8. On or about October 7, 1995, James Erikson and Patrick Kilgallen. . ." (11-20-03 order Appendix D p. 16a). However, the district court inexplicably starts on the eighth (8th) paragraph, and through the eighteenth (18) paragraph and disregarded the first seven paragraphs (1-7) of the second amended complaint as well as paragraphs 19 through 53 and excluded the prayer for relief as true, as well as the attached letter at issue, which showed said letter was faxed to James Erikson on August 14, 2000, and started Plaintiff James Erikson's statute of limitations running upon his receipt of same. The Defendant has never controverted the date of the discovery of the fraudulent letter on August 14, 2000.

Appellants believe that in order for the district court to construe the pleadings in the light most favorable to them as the nonmoving party, the entire complaint must be taken into consideration, not just a select few paragraphs out of the complaint. (In this case the court construed paragraphs eight through eighteen as true). The complaint in its entirety had 53 paragraphs and attachments including the fraudulent letter by the insurance company, which was unknown to Appellant until August 14, 2000. The fact of this first discovery was uncontroverted throughout. Instead, the Defendant insur-

ance company has focused on the date medical records may have been discovered by Petitioners, rather than the discovery of the frauds and cause of action that was intentionally concealed from the Petitioners by the insurance company.

The letters and cause of action against the third party insurance company did not exist at all for the Petitioners prior to August 19, 2000, the earliest for Appellant Erikson on August 14, 2000 as to the one letter discussed infra.

Additionally, focusing on ¶¶ 17 & 18. Of the Second Amended Complaint and affirmed by the Tenth Circuit, the district court found that Petitioners' allegations did not sufficiently establish a pattern of racketeering activity required for a RICO violation, discussed more fully supra. 11-20-03 10-18-05 orders (Appendix D p. 14a-25a and Appendix C p. 4a-13a). The courts apparently overlooked ¶ 1 of the Second Amended Complaint which alleged: ". . . The Defendants have conspired; or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law." (¶ 1 Second Amended Complaint Appendix F p. 56a-57a)

Appellants submit that the Second Amended Complaint in its entirety demonstrate that if the court had taken the evidence in the light most favorable, the Petitioners should have survived a 12(b)(6) motion to dismiss, since attached to the Second Amended Complaint was the August 14, 2000 letter with the facsimile date stamp reflecting August 14, 2000, attached to their Second Amended Complaint, as well as in their responses to the Motion to Dismiss, clearly showed that August 14, 2000 was the first time Plaintiff Erikson could have been aware of a claim against the insurance company. If taken in the light most favorable, Appellants submit that not only should the court have assumed that August 14, 2000 was the de facto date as a result of the

conflict between the parties as to the proper date the statute of limitations started to acrew, but there was an allegation of ongoing pattern for purposes of RICO which also should have survived a 12(b)(6) motion.

The issue in reviewing the sufficiency of the complaint is not whether the Petitioners will prevail, but whether the Petitioners are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982) Dismissal under Federal Rule 12(b)(6) (identical to Oklahoma Statues) is a *"harsh remedy which must be cautiously studied, not only to effectuate the spirit of liberal rules of pleadings but also to protect the interest of justice."* *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989).

A. Statute of Limitations cannot accrue until Petitioners could first maintain an action to successful conclusion.

Appellants had no cause of action against the 3rd party insurance company until they discovered the fraudulent letters sent to their medical providers. Appellants were involved in a relatively minor rear-end accident and suffered soft tissue injuries and property damage. As is common in liability insurance cases, the Petitioners' property damage was settled shortly after the accident. Petitioners were required to sue the tortfeasor for their personal injuries in state court. There was no cause of action available to the Petitioners against the insurance company who was not named in the state court case. Oklahoma law has consistently held that an insurance company, as an insurer, cannot be joined with a tortfeasor in tort actions when liability insurance is involved unless the policy is required by statute, such as the policies that are required for motor carriers. *Holt v. Bell*, 392 P.2d 361, 362 (Okla. 1964). Because Petitioners

had no cause of action against the tortfeasor's insurance company, a legally unrelated third party, it is difficult to understand how the district court reached its conclusion that the statute of limitations began to run before the Petitioners had a cause of action against the insurance company. At the end of the state court trial, Petitioners had no idea that letters had been secretly sent to their medical providers and that in reliance of the misrepresentations in the letters, the medical providers had sent confidential medical records. However, upon the discovery of the letter on August 14, 2000, Petitioners immediately issued a subpoena to Ms. Davis (the tortfeasor-Defendant in the state court trial) for any and all communications and attachments relating to attempts to acquire medical records of the Petitioners. The Appellees filed a motion to quash said subpoena on the basis [inter alia] on the grounds that the subpoena was "fatally flawed," because Petitioners' subpoena lacked language required for subpoenas served on non-parties. 12 Okl. St. § 2004.1 is Oklahoma's civil procedures statute on subpoenas. The insurance company's motion to quash did not provide authority for quashing the subpoena based on the omitted language and apparently was another delaying tactic by the insurance company. The insurance company's motion to quash also requested a protective order requiring "enjoining the Petitioners or their attorney from making any further direct contact with the Defendant," which would necessarily fundamentally violate the statutes requirement that a subpoena must be served directly upon the Defendant. See 12 Okl. St. § 2004.1 (B)(1). See also *Waddle v. Waddle*, 1994 OK CIV, APP 1 868 P.2d 751, 65 OBJ 707, (1994), holding and quashing a subpoena because it was served on the party's attorney rather than directly upon the party. It is also interesting to note that here, at a stage months after the state trial was concluded, the insurance company made concerted efforts to shift the court's focus on production of medical records rather than the instruments used by the insurance

company to obtain said records. The Subpoena Duces Tecum served to Dana Elizabeth Davis, expressly sought, "PROVIDE ANY WRITING/RECORDING OF ANY KIND RELATING TO THE ATTEMPTS TO ACQUIRE MEDICAL RECORDS/INFORMATION OF JAMES M. ERIKSON AND PATRICK KILGALLEN." Appendix E p. 46a, Serial numbers 4583941 and 4599800. The record is abundantly clear that the Petitioners were diligently attempting to discover whatever method was utilized by the insurance company to obtain the Petitioners' medical records, as the Petitioners were never provided copies of any subpoenas or discovery requests by the Defendant as required by Oklahoma's Discovery Code. See 12 Okl. St. § 2004.1 (B)(1). The insurance company's motion to quash further delayed the Petitioners-Appellants discovering the fraudulent activity and thus their cause of action against the third party insurance company. Upon receiving a copy of the motion to quash the subpoena, Petitioners-Appellants issued and served a second subpoena directly upon the Appellees-insurance company's attorneys who very reluctantly provided copies of some 56 letters (identical except as to the addressee-recipient medical provider) which appeared to be a insurance company form letter developed by the insurance company attorneys or their staff. Interestingly, none of the letters produced by the insurance company attorneys included the court order referred to in said letters, which order Appellees represented entitled them to receive all medical records, and further compounds the extent of the Appellees' concealment, since the order waving medical privilege was not included with the items provided in response to the subpoena which required, "ANYTHING AND EVERYTHING USED IN REQUESTING ANY AND ALL INFORMATION WHATSOEVER RELATING TO PETITIONERS". No orders of waiver of medical privilege were provided.

The trial court erroneously applied the commencement of a statute of limitations for a cause in tort relating to discovery

of medical records at time of the state court trial, rather than the time of the discovery of the fraudulent activity, and hence the cause of action against the insurance company for committing the intentional misrepresentations and breaching the medical privilege. (See 43A Okl. St. § 1-109 medical privilege statute). Appellants would have no problem with this application of the statute of limitations applied to the physicians and pharmacies for tortuously providing all of Petitioners-Appellants' confidential medical records, but not applied to the third party insurance company who conducted the frauds in secret and effectively concealing the Petitioners' cause of action against the insurance company. In short, the trial court's application of Oklahoma's two-year statute of limitations would have required the Petitioners to file an action for the undiscovered and unknown frauds perpetrated in secret by a third party against who the Petitioners had not yet discovered they had a cause of action, and could not otherwise sue. The district court and adopted by the Tenth Circuit, applied the holdings in Samuel R. Noble Found., 840 P.2d at 626; and *Chasteen v. UNISI.4 JECS Corp.*, 216 F.3d 1212, 1217 (10th Cir. 2000), wherein the Petitioners could clearly see that there was an open and notorious defect with the tiles of a building and knew they had been damaged and the Defendant had not intentionally concealed the cause of action, unlike the present case wherein the Defendant affirmatively hid the cause of action by concealing the fraudulent letters from the Petitioners. Clearly there is an insufficient nexis between learning during at trial that there may be a breach of medical privilege (medical records referred to by Defense attorney at trial but not admitted into evidence) and discovery that there is a cause of action against a third party insurance company relating to (the fraudulent letters produced by the insurance company three months after the trial was concluded). Oklahoma's statute of limitations is clear and unambiguous, "an action for relief on the ground of fraud—the cause of action in such case shall not be deemed

to have accrued until the discovery of the fraud." 12 O.S. § 95 (3) (Appendix H p. 78a).

If for purposes of a 12(B)(6) motion the court had construed the pleadings in the light most favorable to Appellant, then August 14, 2000 would have been the earliest date the time for purposes of the statute of limitations would have commenced. Appellant submits the allegations were sufficient to overcome a Rule 12(B)6 Motion to Dismiss.

Appellants met the statute of limitation requirement under Oklahoma Law and in addition, "Equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice." *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 853 (Colo.1992).

We have applied the doctrine of equitable tolling where the defendant's wrongful conduct prevented the plaintiff from asserting his or her claims in a timely manner. *See, e.g., Garrett*, 826 P.2d 850 (tolling statute of limitations period where defendant employer failed to provide employee with report needed to file petition for workers compensation); *First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197 (Colo.1987) (holding statute of limitations period subject to equitable tolling for fraudulent concealment of facts underlying wrong); *Strader v. Beneficial Finance Co.*, 191 Colo. 206, 551 P.2d 720 (1976) (tolling statute of limitations where defendant-lender knowingly withheld statutorily required disclosure of true interest rate to plaintiff-borrower); *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968) (applying equitable tolling where plaintiff's mental incapacity, resulting from defendant's assault and battery, prevented timely filing of assault and battery charges). The principle underlying equitable tolling in these circumstances is that a person should not be permitted to benefit from his or her own

wrongdoing. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo. 1996):

> The reasoning underlying these cases is that it is unfair to penalize the plaintiff for circumstances outside his or her control, so long as the plaintiff makes good faith efforts to pursue the claims when possible.

Here, as soon as the Petitioners thought there may be a problem with their medical confidentiality, they wasted no time in diligently pursuing an answer by subpoenaing the source of the mystery, the insurance company, Defendant herein. When the insurance company intentionally began sham delaying tactics to avoid producing the sought after information, the Petitioners swiftly issued a second subpoena directly to and served upon the insurance company attorneys for the records which was concealed and held by said insurance company.

It is uncontroverted by the Defendant insurance company that the content of the letters sent to Petitioners' medical providers were in fact misrepresentations of their entitlement to medical records covered by medical privilege and confidentiality.

"It is established that the two-year limitation period in § 95 Third will commence to run when the claim accrues, and the claim accrues when a litigant first could have maintained his claim to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980).

"Facially, § 95 Third clearly proscribes the bringing of an action or the filing of a claim to recover personal property more than two years after the cause of action or claim accrues."

"We agree with Weaver's assertions that his claim cannot accrue until he could first maintain an action to successful conclusion. The essence of this assertion is that identity of the defendant is an essential element to any cause of action." *See*

In re 1973 John Deere 4030 Tractor, 1991 OK 79, 816 P.2d 1126, 62 OBJ 2437 (Okla. 1991).

II. The decision of the Tenth Circuit in this case squarely conflicts with This Court's decision holding that Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations".

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 (See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 103 P.U.R.4th 513, 109 S.Ct. 2893, 106 L.Ed.2d 195, 57 USLW 4951, RICO Bus.Disp.Guide 7237 U.S.Minn. Jun 26, 1989).

Oklahoma state law permits approximately 5 forms of discovery, including interrogatories, requests for admissions, requests for production of documents, subpoenas and depositions. Each of these methods of discovery requires that the parties to the law suit are to be notified of discovery efforts using any or all of these methods. *See* generally 12 Okl. St. § 3226 *et seq*. And § 2004.1 (B)(1) (Appendix H p. 85a-94a).

After depositions by the insurance company attorneys of both Petitioners and discovering the names of all medical providers and pharmacies used by the Petitioners throughout their respective lifetimes, and including many different states, the insurance company sent the letters at issue to at least 56 medical providers and pharmacies of the Petitioners, representing that the insurance company and attorneys were entitled to all medical records of the Petitioners, due to a Oklahoma State court order waiving medical privilege. The Petitioners were not notified or sent copies of any of the letters sent by the insurance company employees, and it is

believed that their client (the tortfeasor) was not notified of their illegal discovery activities as well. At trial, it was clear that the purpose for obtaining the medical records was to use same to surprise and embarrass the Petitioners with their own medical records, unrelated to the injuries claimed in the accident, as a means of prevailing and avoiding paying damages wherever possible and still receiving insurance premiums at a profit. When it is the third largest insurance company in the United States that literally deals with the public on a scale of thousands of claims each year, the profitability of such RICO behaviors are abundant at the expense of said public.

"The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law." ¶ 1 Second Amended Complaint. This is clearly an allegation that anyone who makes a claim against Farmers was included, and was not limited to a single scheme limited to obtaining Appellants medical records only, but anyone who makes a claim, which is not restricted to a time frame of any kind, as strictly construed by the trial court and in violation of 12 (B)6 requirement that the pleadings be construed in a light most favorable to the Appellants. The ongoing threat exists that the practice of using fraudulent ex-parte communications/letters to circumvent the Oklahoma subpoena statute to obtain and exploit confidential and privileged medical information for profit, and the Appellees' conduct or practice is apparently so widespread within the enterprise, that even Appellee openly admitted in Appellees' Reply Brief that even their legal assistants (or secretaries) send out such ex-parte letters to medical providers of opposition litigants. pg. 7, Statement of the Facts, ¶ 1, 6-17-2004 Reply Brief of Appellees.

There is little if any doubt that the threat of future unlawful conduct against claimants continues to be an ongoing pattern of conduct and is highly likely to continue and persists, especially in light of the fact that the enterprise of Farmers is still conducting the business of insurance and has not disbanded. These are the types of racketeering activity contemplated to be prevented by RICO.

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with the threat of repetition.

Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987).

The Appellants allege a RICO violation in their Complaint and have the opportunity to prove continuity over a closed period by proving a series of related predicates extending over a substantial period of time.

In *H.J. Inc.* at 242, this Court stated:

> A threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise.

In *H.J.*, Justice Scalia concurring quoted from *Sedima* stated that:

> For Terms ago . . . we gave the lower courts four clues concerning the meaning of the enigmatic term "pattern of racketeering activity". They are as follows:
>
> First, we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." *Sedima*, 473 U.S., at 496, n. 14. Second, we pointed out that "two isolated acts of racketeering activity," "sporadic activ-

> ity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* Finally, we directed lower courts' attention to 18 U.S.C. § 3575(e), which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," 473 U.S., at 496, n. 14.

Id. at 251.

Because the Complaint is sufficiently particular and because there remains questions of material fact as to when the RICO claims accrued so as to begin the running of the statute of limitations, there is a question of material facts to be decided by the lower court.

The statute of limitations for RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The crucial issue here is when the alleged RICO claims accrued to Appellants so as to begin the running of the four year statutes.

In *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), the Third Circuit stated that a RICO claim accrues after the occurrence of the last predicate act in the pattern of racketeering. The statute of limitations begins to run from the date "plaintiff knew or should have known" that the elements of a civil RICO cause of action existed, "unless further injury to the plaintiff or further predicate acts occur" in which case the accrual period runs from the time when the "plaintiff knew or should have known of the last injury or the last predicate act" which was part of the same pattern of racketeering activity. *Keystone Ins. Co.*, 863 F.2d at 1130.

In consideration of the above authority, Appellants submit that they have pleaded a sufficient number of claims (well

over the predicate two and including some 56 fraudulent letters written by the Defendants to unlawfully obtain medical records protected by privilege), to establish a RICO claim and that they should be allowed to pursue their RICO claims against Appellee, and to have the opportunity to discover and prove whether their theory that more fraudulent activity by these Defendants' enterprises has been conducted in secret. The Complaint does set forth facts sufficient to provide evident to support their claims. Thus, the Court should reverse the Tenth Circuit's ruling of October 18, 2005 and the trial court's ruling.

Never the less, the Tenth Circuit concluded that even though there was an ongoing pattern 56 or more potential violations of law by the insurance company, the Petitioners' were unable to allege a pattern for purposes of RICO.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TALMAGE L. BARR
BARR LAW OFFICE
2320 Westpark Drive
Norman, OK 73069
(405) 364-1919

PATRICIA E. ROBERTS *
P.O. Box 3696
Williamsburg, VA 23187
(757) 229-4172

Attorneys for Petitioners

* Counsel of Record

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 16, 2006

Mr. Talmage L. Barr
2320 Westpark Drive
Norman, OK 73069

Re: James M. Erikson and Patrick Kilgallon
v. Farmers Group, Inc., et al.
Application No: 05A849

Dear Mr. Barr:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on March 16, 2006 extended the time to and including May 11, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Melissa Blalock
MELISSA BLALOCK
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Talmage L. Barr
2320 Westpark Drive
Norman, OK 73069

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed December 12, 2005]

No. 03-6352

JAMES M. ERIKSON; PATRICK KILGALLEN,
Plaintiffs-Appellants,

v.

FARMERS GROUP, INC., a Nevada corporation; RICHARD J. BRUCE; WILLIAM D. PETTIGREW, individually and as agents and employees of Farmers Insurance Group of Companies, and Dobbs and Middleton,
Defendants-Appellees.

ORDER

Before BRISCOE, McWILLIAMS and McCONNELL, *Circuit Judges*.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CLERK, COURT OF APPEALS

by: /s/ L. Halley
L. HALLEY
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed October 18, 2005]

No. 03-6352
Western District of Oklahoma
(D.C. No. CIV-02-1117-L)

JAMES M. ERIKSON and PATRICK KILGALLEN,
Plaintiffs-Appellants,

v.

FARMERS GROUP, INC., a Nevada corporation; RICHARD J. BRUCE; WILLIAM D. PETTIGREW, individually and as agents and employees of Farmers Insurance Group of Companies, and Dobbs & Middleton,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before BRISCOE, McWILLIAMS, and McCONNELL, *Circuit Judges.*

This case arises out of a personal injury action in an Oklahoma state court. Plaintiffs allege that Farmers Group, Inc. ("Farmers") misrepresented the scope of the state court's medical privilege waiver and thereby improperly obtained confidential medical records. On June 26 and 27, 2000, Farmers introduced into evidence some of the information

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

contained in those medical records. Plaintiffs claim that they learned of Farmers' alleged misrepresentation on August 14, 2000 when they received a copy of a letter sent by Farmers to one of Mr. Erikson's physicians. Plaintiffs filed the current lawsuit in the United States District Court for the Western District of Oklahoma on August 14, 2002, asserting state law claims against Farmers for invasion of privacy and misrepresentation, and a federal claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. The district court dismissed Plaintiffs' claims, finding that Plaintiffs' state law claims were barred by Oklahoma's two-year statute of limitations and that Plaintiffs failed to allege a pattern of racketeering activity. We AFFIRM.

I.

In 1995, Plaintiffs James Erikson and Patrick Kilgallen were rear-ended by a vehicle driven by Dana Davis-Lauderdale, who Plaintiffs allege was insured by Farmers.[1] Mr. Erikson and Mr. Kilgallen filed a lawsuit against Ms. Davis-Lauderdale in the District Court of Cleveland County, Oklahoma. The Cleveland County court ordered a partial medical privilege waiver permitting Farmers to obtain medical records regarding Mr. Erikson's headaches, neck, back, shoulder, arm, and blood pressure problems, and Mr. Kilgallen's head, neck, back, side, shoulder, and arm problems. Plaintiffs allege that Farmers, acting through the attorneys at Dobbs & Middleton who represented Ms. Davis-Lauderdale, sent letters to 46 health-care providers who had treated or examined Plaintiffs before or after the automobile accident. According to Plaintiffs, these letters misrepresented the scope of the partial medical privilege waiver, stating that the court order entitled Farmers to obtain all medical information contained

[1] Defendant, whose full name is Farmers Group, Inc., disputes the allegation that it insured Ms. Davis-Lauderdale, claiming that it is not an insurance company. Because Farmers declined to address this issue on appeal, we do not consider it here.

in Mr. Erikson's and Mr. Kilgallen's files. The court's medical privilege waiver was attached to the letters.

On January 20, 2000, Plaintiffs filed a motion *in limine* in the state court proceedings to exclude any reference to their pre-existing medical conditions or disabilities. In the motion, Plaintiffs argued that Farmers provided the Plaintiffs with an extensive and voluminous collection of Plaintiffs' pre-existing medical conditions, constituting approximately 2,000 pages of records. Plaintiffs sought to exclude the medical records because Farmers obtained the records without providing Plaintiffs with a copy of the subpoena as required under Oklahoma law. Although the record is not entirely clear, this motion was apparently denied.

Plaintiffs allege that at trial, on June 26 and 27, 2000, Farmers introduced confidential medical records that were outside the scope of the partial medical privilege waiver. Specifically, they allege that at trial Farmers made known to the court, jurors, and general public confidential medical information relating to injuries suffered in a taxi-cab accident in the 1940s, that one of them was prescribed Prozac, and that one of them had been previously prescribed massage therapy. Plaintiffs claim that these medical records were not relevant to the personal injury claim, and that they were unduly embarrassed, surprised and taken aback when this evidence was introduced at trial. The jury returned a verdict in favor of Ms. Davis-Lauderdale on June 28, 2000.

Later, on August 14, 2000, Plaintiffs received a copy of the letter sent by Farmers to Dr. Thomas Hoffmeyer, one of Mr. Erikson's medical providers. Plaintiffs then subpoenaed Farmers for copies of all letters sent to Mr. Erikson's and Mr. Kilgallen's medical providers, and Farmers produced copies of all letters. On September 26, 2000, Plaintiffs moved in the District Court of Cleveland County for a judgment notwithstanding the verdict, based in part on their assertion that Farmers wrongfully obtained the medical records that were

used against Mr. Erikson and Mr. Kilgallen at trial. After the trial court denied the motion, Plaintiffs appealed to the Oklahoma Court of Civil Appeals, which affirmed.

On August 14, 2002, Plaintiffs filed this lawsuit in the United States District Court for the Western District of Oklahoma. Plaintiffs alleged that Farmers violated RICO by fraudulently stating or implying that a court authorized the release of medical records not pertaining to Plaintiffs' injuries. Invoking the court's diversity jurisdiction, Plaintiffs also asserted state law claims of invasion of privacy by intrusion, private life invasion of privacy, false light invasion of privacy, and misrepresentation. Farmers filed a motion to dismiss, claiming that Plaintiffs' state law claims were barred by the statute of limitations, the doctrine of collateral estoppel, and the doctrine of absolute litigation immunity; and that the RICO claim failed to allege a pattern of racketeering activity. The district court found that because Plaintiffs knew of Farmers' alleged wrongful conduct at the personal injury trial, more than two years before this lawsuit was filed, Plaintiffs' claims were barred under Oklahoma's two-year statute of limitations. The district court also held that Plaintiffs' allegations did not establish a pattern of racketeering activity because Plaintiffs did not allege a threat of continuing criminal activity. Plaintiffs now appeal the district court's dismissal of their claims.

II.

We review the district court's grant of a motion to dismiss *de novo*. *U.S. West, Inc. v. Tristani*, 182 F.3d 1202, 1206 (10th Cir. 1999). In reviewing the district court's grant of a 12(b)(6) motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). Exhibits attached to a complaint and matters of public record are properly treated as part of the pleadings for purposes of

ruling on a motion to dismiss. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (facts subject to judicial notice, such as prior court proceedings, may properly be considered in a motion to dismiss); *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001). We will affirm a dismissal "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Deck v. Engineered Laminates*, 349 F.3d 1253, 1256 (10th Cir. 2003).

A. State Law Claims of Invasion of Privacy and Misrepresentation

The district court dismissed Plaintiffs' invasion of privacy and misrepresentation claims under Oklahoma's two-year statute of limitations. The district court found that the statute of limitations began to run no later than June 28, 2000, the date on which the jury returned a verdict in the state court trial. Whether a district court properly applied a statute of limitations and the date on which the statute of limitations accrued under undisputed facts are questions of law we review *de novo*. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005). Both parties agree that Oklahoma law applies to Plaintiffs' state law claims.

Under Oklahoma law, claims for invasion of privacy and misrepresentation are subject to a two-year statute of limitations. Okla. Stat. tit. 12, § 95 (two-year statute of limitations applies to actions for injury to the rights of another, not arising under contract); *Colbert v. World Publ'g Co.*, 747 P.2d 286, 288-89 (Okla. 1987) (holding that Title 12, Section 95 applies to claims for false light invasion of privacy). Oklahoma courts apply the so-called "discovery rule" to determine when the two-year statute of limitations accrues. *Smith v. Baptist Found. of Okla.*, 50 P.3d 1132, 1137 (Okla. 2002). The discovery rule provides that "the limitations period does not begin to run until the date the plaintiff knew or should have known of the injury." *The Samuel Roberts*

Noble Found., Inc. v. Vick, 840 P.2d 619, 624 (Okla. 1992). Even under the discovery rule, a plaintiff is required to pursue claims with diligence. *Daugherty v. Farmers Coop. Ass'n*, 689 P.2d 947, 951 (Okla. 1984). The statute of limitations is not tolled simply because a plaintiff "negligently refrain[s] from prosecuting inquiries plainly suggested by the facts." *Id.* Accordingly, a plaintiff is charged with having knowledge of those facts which ought to have been discoverable in the exercise of reasonable diligence. *Id.*

The central question in deciding whether the statute of limitations has expired for Plaintiffs' claims is when the Plaintiffs knew or should have known that they suffered injury. Plaintiffs' invasion of privacy and misrepresentation claims all focus upon the injury Plaintiffs suffered when Farmers obtained and disclosed private medical information to the court, jurors, and members of the general public at trial on June 26 and 27, 2000. However, Plaintiffs contend their claims are not barred by the statute of limitations because they did not become aware of Farmers' alleged misrepresentations until August 14, 2000.

The discovery rule, as interpreted by the Oklahoma Supreme Court and this Court, tolls the limitation period only until a plaintiff learns of an injury and, through prudent investigation, can obtain sufficient facts to state a cause of action. In *Samuel R. Noble Foundation*, for example, the Oklahoma Supreme Court held that the plaintiff's awareness that doors were sticking and tiles were popping off a newly constructed building was sufficient information to start the limitations period even though the exact source of the problem was unknown until the completion of a later, independent report. *Samuel R. Noble Found.*, 840 P.2d at 626; *see also Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212, 1217 (10th Cir. 2000) (stating that it was irrelevant whether the plaintiff understood that the defendant's actions constituted a misap

propriation of trade secrets as long as the plaintiff knew of the facts which could give rise to such a claim).

The situation presented here is analogous to that in *Samuel R. Noble Foundation*. Just as in that case the plaintiff was aware of their injuries when the doors were sticking and tiles were falling off, Plaintiffs here were aware that their privacy rights were invaded on June 26 and 27, 2000 when Farmers introduced confidential medical information allegedly outside the scope of the state court's partial medical privilege waiver. Plaintiffs' complaint alleges that the Plaintiffs were "unduly embarrassed, surprised and taken aback" *at trial* by the introduction of this confidential medical information. Once the injury occurred at trial, the only information Plaintiffs lacked was how Farmers obtained the medical records. The mere fact that Plaintiffs did not know *how* Farmers obtained the confidential medical information is insufficient to toll the limitations period, just as the *Samuel R. Noble Foundation* plaintiff's ignorance about the exact nature or cause of the building defects was insufficient to toll the limitation period in that case. *See Samuel R. Noble Found.*, 840 P.2d at 625-26 ("It was not necessary that the plaintiff have knowledge of the exact nature or source of the defects, but only the knowledge that a problem existed."). Plaintiffs' awareness at trial that they had suffered an injury was sufficient to permit them to investigate Farmers' source of information, an investigation that, once pursued, led to information useful to their state law claims. Under Oklahoma's interpretation of the discovery rule, Plaintiffs possessed sufficient information to permit them to pursue their claims such that the limitations period started to run no later than June 28, 2000.

Applying Oklahoma's two-year statute of limitations for invasion of privacy and misrepresentation, the statute of limitations expired no later than June 28, 2002. Plaintiffs did not file this lawsuit until August 14, 2002. Therefore, the district court properly held that Plaintiffs' misrepresentation

and invasion of privacy claims are barred by the statute of limitations. Because Plaintiffs' state law claims are barred by the statute of limitations, we do not consider Farmers' other defenses.

B. RICO Claim

Aside from their state law claims, Plaintiffs also allege that Farmers operated an enterprise that conducted its affairs by using wire and mail fraud to obtain Plaintiffs' medical records in violation of 18 U.S.C. § 1962(c). To successfully state a RICO claim, a plaintiff must allege four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted); *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002). The district court dismissed Plaintiffs' RICO claim, finding that Plaintiffs failed to allege the third element: a pattern of racketeering activity.

Section 1962(c) prohibits any person employed by or associated with any enterprise engaged in activities affecting interstate commerce to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). A "pattern of racketeering activity" must include "at least two acts of racketeering activity" in a ten-year period. *Id.* § 1961(5). Furthermore, to show a pattern of racketeering activity, a RICO plaintiff must also satisfy two additional elements: "a relationship between the predicates" and "the threat of continuing activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). A plaintiff may demonstrate continuity by establishing either closed-ended or open-ended continuity. *Id.* at 241.

> [C]losed-ended continuity requires "a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months" are insufficient. *H.J. Inc.*, 492 U.S. at 242. Open-ended

> continuity requires a clear threat of future criminal conduct related to past criminal conduct.

Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1273 (10th Cir. 1989). A single scheme to accomplish one discrete goal, directed at a finite group of individuals, with no potential to extend to other persons or entities, rarely will suffice to establish a threat of continuing activity. *See Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1556 (10th Cir. 1992); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990); *Phelps*, 886 F.2d at 1273-74.

Plaintiffs have alleged that Farmers committed 46 acts of mail or wire fraud by sending letters to Plaintiffs' healthcare providers that misrepresented the scope of the partial medical privilege waiver. Even if each letter were to constitute a separate act of racketeering activity, Plaintiffs have failed to establish a threat of continuing criminal activity. Plaintiffs' allegation amounts to no more than a claim that Farmers engaged in a single scheme to obtain medical information about them before the Oklahoma trial from a large number of sources. Plaintiffs cannot demonstrate closed-ended continuity because the predicate acts of mailing the letters occurred exclusively during discovery—a period not exceeding a few months. *See Boone*, 972 F.2d at 1555-1556 (schemes and episodes occurring over 23 months did not satisfy the RICO continuity requirement). Likewise, there is no threat of future criminal conduct that will establish open-ended continuity.

The trial having concluded, there is no possibility that Farmers will continue this scheme with regard to these Plaintiffs. Nor have Plaintiffs alleged that Farmers consistently engages in this pattern of misrepresentation and mail fraud in its regular course of business, such that future claimants in Plaintiffs' situation will suffer the same injury. Plaintiffs have not alleged the type of long-term criminal activity against which the RICO statute is aimed. *See H.J. Inc.*, 492 U.S. at

242. Accordingly, the district court's dismissal of the RICO claim was not in error.[2]

III.

For the foregoing reasons, we AFFIRM the judgment of the district court granting Farmers' motion to dismiss.

Entered for the Court

Michael W. McConnell
Circuit Judge

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[2] Plaintiffs also contend that the district court abused its discretion by not allowing them to amend the RICO allegations in their Second Amended Complaint and by dismissing the case before Plaintiffs conducted additional discovery. However, Plaintiffs failed to request leave to amend their complaint or conduct additional discovery. Accordingly, the district court did not err in failing to grant relief not sought. *See, e.g., Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) (holding there was no error in the district court's failure to rule on a request to amend a complaint contained in a response to a motion to dismiss, where the plaintiffs never filed a motion for leave to amend the complaint after the district court dismissed the complaint).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-02-1117-L

JAMES M. ERIKSON and PATRICK KILGALLEN,
Plaintiffs,

v.

FARMERS GROUP, INC., a Nevada Corporation, *et al.*,
Defendants.

ORDER

Plaintiffs James Erikson and Patrick Kilgallen bring this action against the named defendants "Farmers Group, Inc., (a Nevada corporation) and affiliated companies; d-b-a The Farmers Insurance Group of Companies and affiliated companies; all defendants jointly and severally" asserting claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (RICO) (First Claim for Relief), Mail and/or Wire Fraud (Second Claim for Relief), Misrepresentation (Third Claim for Relief), Invasion of Privacy by Intrusion (Fourth Claim for Relief), Private Life Invasion of Privacy (Fifth Claim for Relief), and False Light Invasion of Privacy (Sixth Claim for Relief). Plaintiffs allege that this court "has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331; diversity jurisdiction under 28 U.S.C. § 1332(c)1 [sic]; and supplemental jurisdiction under 28 U.S.C. § 1367.[1]

[1] Plaintiffs do not explain why supplemental jurisdiction is invoked if, as alleged, diversity jurisdiction is present. The court need not resolve this ambiguity.

Defendant, Farmers Group, Inc.[2], has moved to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds: (1) plaintiffs' claims are barred by the doctrine of collateral estoppel; (2) plaintiffs' claims are barred by the doctrine of absolute immunity; (3) plaintiffs' claims are barred by the statute of limitations; and (4) additional reasons supporting dismissal. Plaintiffs have responded to the Motion to Dismiss and reply and supplemental briefs were allowed. Based upon its thorough review of the Second Amended Complaint and the submissions of the parties, the court determines that plaintiffs' action should be dismissed.

It is well settled that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted); *Meade v. Grubbs*, 841 F.2d 1512, 1526 (10th Cir. 1988). The complaint must be construed in the light most favorable to plaintiff and all factual allegations in the complaint must be presumed to be true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Meade*, 841 F.2d at 1526. Plaintiffs have attached certain exhibits to the Second Amended Complaint and both parties have attached evidentiary materials to their briefs. There is authority for the court to treat the dismissal motion as a motion for summary judgment under such circumstances. Fed. R. Civ. P. 12(b); *Varga v. Rumsfeld*, 172 F.Supp.2d 1323, 1325 (D. Kan. 2001); *David v. City and County of Denver*, 101 F.3d 1344 (10th Cir. 1996) (notice required by Rule 12(b) may be constructive and submission of evidentiary materials by either or both parties may constitute sufficient notice). However, the court finds that conversion of the dismissal motion to a

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[2] Defendant Farmers Group, Inc. states it is incorrectly sued as Farmers Group, Inc. and affiliated companies; d-b-a The Farmers Insurance Group of Companies and affiliated companies.

motion for summary judgment is not necessary. In making this finding, the court notes that where an undisputed document aids the court by supplementing a factually inadequate complaint, the document is properly considered on a Rule 12(b)(6) motion. *Hall v. Bellmon*, 935 F.2d 1106, 1112-13 (10th Cir. 1991). With the exception of undisputed documents and matters of public record, all materials outside the pleadings have been excluded by the court in its consideration of the Motion to Dismiss. *See* Fed. R. Civ. P. 12(b).

For purposes of the Motion to Dismiss, the court accepts the following "General Allegations" of the Second Amended Complaint as true (paragraph numbering as in original):

> 8. On or about October 7, 1995, James Erikson and Patrick Kilgallen were passengers in an automobile which was rear-ended by Dana Davis-Lauderdale. Patrick and James suffered mostly soft-tissue injuries, and the eye-glasses Patrick was wearing were broken from the impact of the two automobiles. Both Patrick and James were treated by their respective medical providers for said injuries and released within a matter of a few months.
>
> 9. Patrick and James timely made claims against the liability insurance policy carried by Davis-Lauderdale, Farmers Insurance, for payment of their related property and medical expenses. Farmers and Davis-Lauderdale refused to pay said medical expenses, and suit was brought in the State District Court of Cleveland County, where the accident occurred.
>
> 10. During the discovery phase of the litigation, Farmers, through Dobbs and Middleton[3] through its em-

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[3] Paragraph 6 of the Second Amended Petition alleges that defendant acts as "employer, owner and/or contractor with the Oklahoma firm of Dobbs and Middleton which represents on its letterhead: 'Employees of the Litigation Department of Farmers Insurance Group of Companies.'"

ployees, attorneys and/or agents, obtained a state court order partially waiving medical privilege of Patrick and James, restricted to the areas of the body at issue in the litigation and [p]ursuant to Oklahoma Statutes Title 76 at section 19, which waives the medical privilege to the areas of the body at issue in a suit.

11. Unknown to Patrick and James, Farmers, through Dobbs and Middleton, through its employees, attorneys and/or agents, conspired and/or sent letters to all of the medical providers of Patrick and James, misrepresenting and stating that the attached court order entitled the Defendants to all medical records, "every page." Said communications were sent through use of the U.S. Mail and/or across wire communications, and across state lines. Said letters were sent on letterhead emblazoned with Dobbs and Middleton, Employees of the Litigation Department of Farmers Group of Insurance Companies, and signed by authority of Farmers. See example of one of numerous letters sent to medical providers of James Erikson attached hereto as Exhibit A. See also example of one of numerous letters sent to medical providers of Patrick Kilgallen attached hereto as Exhibit B. See also Order Waiving Medical Privilege of James Erikson, and Patrick Kilgallen, attached hereto as Exhibits C and D respectively. As a result of said misrepresentations, bad faith and/or fraud on the part of the Defendant, the Defendants were able to procure all medical records of Patrick and James, from the several medical providers whom complied with said letters.

12. During possession of said records, Defendants published and provided the medical records to known and unknown third parties, including Defendant's hired outside witnesses familiar with medical terminology. At trial, Defendant made known to the court, the jurors and

general public in attendance confidential medical information including but not limited to injuries suffered as a result of a taxi-cab accident which occurred when one of the men was underage in the 1940's, one of the men had at one point was [sic] prescribed the medication Prozac, which had [sic] unrelated to the case at issue, and that one of the men had been prescribed massage therapy many years previously, also unrelated to the case at issue. The Defendant also made defamatory statements against James as an attorney. (James had not entered an appearance in this matter). None of which was relevant to the 1995 automobile accident. As a result of these revelations of their confidential medical records, Patrick and James were unduly embarrassed, surprised and taken aback and were thereby defamed.[4] The jury found in favor of the Defendant. Patrick and James were subsequently assessed the costs of the action by the trial court as the non-prevailing party.

13. One of James' medical providers, Dr. Thomas Hoffmeyer from the State of Virginia, later provided a copy of the letter he had received on behalf of Farmers, dated September 3, 1998. in response to a subsequent Subpoena Duces Tecum, Dobbs and Middleton on behalf of Defendant Farmers provided copies of the letters sent to Patrick and James' medical providers. Examples of said letters are attached hereto as Exhibits A and B.

14. On or about September 3, 1998, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed a letter to be mailed via United States Postal Service to Dr. Jonathan Schwartz, a health-

[4] The court notes that the Second Amended Complaint does not contain a separate claim for relief based on alleged defamation.

care provider for James, a copy of which letter is attached as Exhibit A, which stated in pertinent part as follows:

> "Enclosed please find a [sic] Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills *or other information contained in the patient's chart or file*. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report."

15. On or about January 12, 1999, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed a letter to be mailed via United States Postal Service to Presbyterian Hospital, a healthcare provider for Erikson, a copy of a similar letter is attached as Exhibit A, which stated in pertinent part language similar to that referenced in paragraph 14 above.

16. Upon information and belief, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed letters containing similar language, on or about the dates referenced in paragraphs 14 and 15 above, to be mailed via United States Postal Service to various healthcare providers for Erikson and/or Kilgallen, including without limitation the following healthcare providers: [List of health-care providers omitted by the court.]

17. The letters referenced in paragraphs 14 through 16 were fraudulent insofar as they stated or implied that

a court had authorized or ordered the release of medical records that did not pertain to Plaintiffs' injuries sustained in the automobile accident that occurred on or about October 7, 1995.

18. Upon information and belief, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed wire communications to be made to certain health-care providers for Plaintiffs Erikson and/or Kilgallen, at or near the times when the referenced letters were mailed, seeking medical records of Erikson and/or Kilgallen through the use of representations that were fraudulent insofar as they stated or implied that a court had authorized or ordered the release of medical records that did not pertain to Plaintiffs' injuries sustained in the automobile accident that occurred on or about October 7, 1995, including without limitation wire communications to the following health-care providers: [List of health-care providers omitted by the court and in original.]

Accepting these allegations of the Second Amended Complaint as true, the court agrees with defendant that all of plaintiffs' tort claims based upon these facts are barred by Oklahoma's two year statute of limitations. 12 O.S. § 95. For purposes of a statute of limitations, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis for the action and its cause. *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993); *Arvayo v. United States*, 766 F.2d 1416, 1419 (10th Cir. 1985). The Tenth Circuit has rejected any suggestion that a plaintiff must "conclusively" know of the injury and its cause before a statute of limitations is triggered. *Grasheim v. Corr*, 242 F.3d 388 (Table), 2000 WL 1800506, **2, (10th Cir. (Okla.)), *citing Chasteen v. Unisia Jecs Corp.*, 216 F.3d 1212, 1218 (10th Cir. 2000); Baker, 991 F.2d at 632. The case cited by defendant, *Samuel Roberts Noble Foundation, Inc. v. Vick*,

840 P.2d 619, 626 (Okla. 1992), also rejects the argument that the limitations period does not begin to run until a plaintiff knows the "exact source" of the problem. As stated by the Oklahoma Supreme Court:

> [Plaintiff] urges that because the exact source of the problem was unknown until the independent report was completed, the limitations period did not begin until then. We disagree. It is uncontroverted that the defects in the building began to appear almost immediately. Even though there was some uncertainty as to the reasons for the problem, the observation of doors sticking and tiles popping off alerted [plaintiff] that a problem existed.

Id. Here, the Second Amended Complaint clearly alleges that plaintiffs knew of the alleged wrongful conduct of defendant "at trial," *i.e.*, during the underlying state court trial. Paragraph 12 states in pertinent part: "At trial, Defendant made known to the court, the jurors and general public in attendance confidential medical information including but not limited to injuries suffered as a result of a taxi-cab accident which occurred when one of the men was underage in the 1940's, one of the men had at one point was [sic] prescribed the medication Prozac, which had [sic] unrelated to the case at issue, and that one of the men had been prescribed massage therapy many years previously, also unrelated to the case at issue. . . . As a result of these revelations of their confidential medical records, Patrick and James were unduly embarrassed, surprised and taken aback and were thereby defamed."

As stated by defendant in the Motion to Dismiss and as confirmed by accessing the publicly available docket sheet in the underlying state court action, *Erikson and Kilgallen v. Davis, et al.*, No. CJ-1997-2054, District Court of Cleveland County, Oklahoma, the jury trial was held on June 26 and 27, 2000 and the jury returned with its verdict in favor of defendant on June 28, 2000. (Docket sheet in Case No.

CJ-1997-2054 available at www.oscn.net). The allegations of the Second Amended Complaint thus demonstrate that "at trial," i.e., no later than June 28, 2000, plaintiffs knew or had reason to know of the injury which is the basis for their claims of misrepresentation, invasion of privacy by intrusion, private life invasion of privacy, and false light invasion of privacy.[5] In accepting the facts alleged in the Second Amended Complaint as true, it is clear that plaintiffs knew or should have known, no later than June 28, 2000, that defendant had obtained medical records from their health-care providers which exceeded the scope of the court's Order for Waiver of Medical Privilege. Plaintiffs knew at the time of trial that they had not provided the records to defendant. Plaintiffs' alleged injury also occurred "at trial." Therefore, plaintiffs' original complaint in this lawsuit, filed August 14, 2002, more than two years after the June 26 through June 28, 2000 state court trial, was untimely and plaintiffs' tort claims are barred by the applicable statute of limitations. 12 O.S. § 95 (two year statute of limitations applies to action for injury to the rights of another, not arising on contract).

In light of this determination, the court need not and does not consider the merits, if any, of plaintiffs' tort claims. Nor is the court required to address the other arguments submitted by defendant in support of dismissal of the tort claims. However, were the court to consider the other arguments, the court determines that dismissal of the tort claims would be warranted on the other grounds raised by defendant in the Motion to Dismiss.

Defendant's Motion to Dismiss must also be granted as to plaintiffs' RICO claim. To survive a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a civil RICO claim must allege (1) conduct (2) of an enterprise (3) through a pattern

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[5] Plaintiffs state in their response brief that their wire fraud claim should be viewed as a part of the RICO claim rather than a separate claim.

(4) of racketeering activity. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989). To prove a pattern of racketeering activity a plaintiff must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Here, plaintiffs have alleged that the predicate acts are mail fraud and/or wire fraud in connection with the sending of communications to plaintiffs' health-care providers seeking the release of medical records. Plaintiffs allege that these specifically referenced communications were fraudulent "insofar as they stated or implied that a court had authorized or ordered the release of medical records that did not pertain to Plaintiffs' injuries sustained in the automobile accident that occurred on or about October 7, 1995." Second Amended Complaint, ¶¶ 17 & 18. The court finds that plaintiffs' allegations do not sufficiently establish a pattern of racketeering activity required for a RICO violation. In making this finding, the court is guided by the Tenth Circuit case of *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001).

In *Duran*, the plaintiff alleged that the defendants engaged in a pattern of racketeering activity involving two predicate acts, bribery and extortion. Mr. Duran claimed that the defendant's offer to sell him certain land in exchange for the favorable consideration of defendant's application for approval of a subdivision constituted bribery. *Id.* Mr. Duran also contended that the defendant committed extortion when he threatened Mr. Duran with bodily injury, when he threatened to tie him up in court for ten years, and when he filed counterclaims in Mr. Duran's lawsuits. *Id.* The Tenth Circuit affirmed the trial court's dismissal of plaintiff's RICO claim pursuant to Rule 12(b)(6), stating:

> The district court concluded, and we agree, that, even if the acts Mr. Duran alleged are related as part of a common scheme, he has failed to show that they pose a

> threat of continuing criminal activity. At best, what Mr. Duran alleged is "actually a closed-ended series of predicate acts constituting a single scheme . . . to accomplish a discrete goal [approval of the subdivision] directed at a finite group of individuals [Mr. Duran] 'with no potential to extend to other persons or entities.'" *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1556 (10th Cir. 1992) (*quoting Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990)). Therefore, "[t]hey do not . . . satisfy the *H.J. Inc.* test of continuity." *Id.*

Duran, 238 F.2d at 1271. According to the court, Mr. Duran alleged, at most, a property dispute which turned hostile; he did not allege the "type of long-term criminal activity envisioned by Congress when it enacted RICO." *Id.*

Similarly, applying the reasoning of *Duran* to the facts of this case, even if the court assumes that plaintiffs here have sufficiently alleged related acts as part of a common scheme, they have failed to show that the acts pose a threat of continuing criminal activity. To the contrary, the allegations of the Second Amended Complaint reveal an isolated incident occurring over a limited and closed period of time. No threat of continuing activity is alleged, nor can it reasonably be inferred from the Second Amended Complaint. "Nothing in the allegations . . . indicates that the scheme here was formulated to accomplish more than one discrete goal or to continue after that goal was achieved." *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987). The allegations of the Second Amended Complaint, even if true, are insufficient as a matter of law to support a RICO claim and fail to satisfy the required RICO pattern of racketeering activity. Accordingly, dismissal of plaintiffs' RICO claim is appropriate.

For the reasons stated above, Defendant's Motion to Dismiss [Doc. No. 21] is GRANTED; this action is DISMISSED.

It is so ordered this 20th day of November, 2003.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

Entered in Judgment on 11-20-03

APPENDIX E

IN THE DISTRICT COURT IN AND FOR
CLEVELAND COUNTY, OKLAHOMA

[Filed October 3, 1997]

No. CJ-1997-2054

JAMES M. ERIKSON, PATRICK KILGALLEN,
Plaintiff,

v.

DANNA ELIZABETH DAVIS AND
UNITED SERVICES AUTOMOBILE AS,
Defendant.

Judge: Hetherington, Jr., William

PARTIES

Davis, Danna Elizabeth et al, Defendant
Erikson, James M, Plaintiff
Kilgallen, Patrick, Plaintiff

ATTORNEYS

ATTORNEY	Represented Parties
Barr, T Leslie (Bar # 17416) 2320 WESTPARK DR. NORMAN, OK 73069 PETTIGREW, WM/RICHARD BRUCE	ERIKSON, JAMES M KILGALLEN, PATRICK DAVIS, DANNA ELIZABETH ET AL

EVENTS

EVENT	PARTY	REPORTER
Monday, August 3, 1998 at 13:30 PM MOTION TO CONSOLIDATE/DEF (MOD)		
Monday, August 31, 1998 at 13:30 PM MTN OF DEF, FOR ORDER WAIVING MED PRIVILEGE/DEF (MOD)		
Monday, December 14, 1998 at 13:30 PM PLAINTIFFS MOTION TO COMPEL (MOD)		
Monday, March 8, 1999 at 13:30 PM PLTF'S REQUEST TO STAY (MOD)		
Monday, March 15, 1999 at 13:30 PM PLTFS REQST TO STAY RESET FROM 3/15 (MOD)		
Friday, August 6, 1999 at 9:00 AM PRETRIAL CONFERENCE/RESET (PTC)		
Tuesday, August 10, 1999 at 8:30 AM PRETRIAL CONFERENCE-RESET (PTC)		

EVENTS

EVENT	PARTY	REPORTER
Friday, October 15, 1999 at 8:45 AM PRETRIAL CONFERENCE (PTC)		
Monday, October 25, 1999 At 13:30 PM DEFTS APPLICATION TO EXTEND DISCOVERY-STRICKEN (MOD)		
Monday, November 29, 1999 at 8:30 AM JURY TRIAL-PASSED (TRJ)		
Monday, January 24, 2000 at 8:30 AM JURY TRIAL (TRJ)		Tom A. Lucas
Monday, June 19, 2000 at 8:30 AM JURY TRIAL (TRJ)		William Hetherington, Jr.
Monday, June 26, 2000 at 8:30 AM JURY TRIAL (TRJ)		William Hetherington, Jr.
Monday, September 25, 2000 at 13:30 PM MOTION TO SETTLE JOURNAL ENTRY (MOD)	Davis, Danna Elizabeth Et Al	William Hetherington, Jr.
Tuesday, October 3, 2000 at 14:00 PM MOTION TO TAX COST HEARING (HEA)		Rodney David Ring

EVENTS

EVENT	PARTY	REPORTER
Tuesday, October 3, 2000 at 14:00 PM MOTION TO SETTLE J E (MOD)		Rodney David Ring
Monday, July 16, 2001 at 13:30 PM DEFENDANT'S MOTION TO REQUIRE SUPERSEDES BOND (MOD)		William Hetherington, Jr.
Monday, November 5, 2001 at 13:30 PM PLAINTIFF'S REQUEST FOR STAY (MOD)		William Hetherington, Jr.

ISSUES

For cases filed before 1/1/2000, ancillary issues may not appear except in the docket.

Issue # 1.	Count as filed: DAMAGE, Case Filing: DAMAGES Issue Filed: 10/03/1997
Defendant	Disposition Information
ERIKSON, JAMES M	Disposed: JUDGEMENT FOR DEFENDANT, 06/28/2000. Jury Trial.

DOCKET ENTRIES

DATE	CODE	SERIAL #	ENTRY DATE
10/03/1997	DMFE DISPUTE MEDIATION FEE [2.00]	2114020	Oct 3 1997
10/03/1997	PFE1 PETITION [69.00]	2574764	Oct 3 1997
10/03/1997	PFE7 LAW LIBRARY FEE [3.00]	2744519	Oct 3 1997
10/03/1997	TOTAL AMT. RECVD. – CHECK (# 97-003942) BLAKE VIRGIN LAWYER [74.00]	2946028	Oct 3 1997
10/03/1997	DAMAGE 1 CASE FILING: DAMAGES	4126610	Feb 6 2000
10/21/1997	APLI APPLICATION TO WITHDRAW/ATTY FOR PLTF, BLAKE VIRGIN	2742681	Oct 27 1997
10/27/1997	O ORDER ALLOWING WITHDRAWAL *WCH	2264377	Oct 30 1997
01/05/1998	PLTFS REQUEST TO STAY INDEPENDENT MEDICAL EXAMINAT	2694999	Jan 8 1999
03/25/1998	O ORDER TO DISMISS THE DEF USAA)/ PLTF*RLB*	1796589	Mar 26 1998
03/25/1998	MOTION TO DISMISS ONE OF THE DEF'S/PLTF	1838483	Mar 26 1998

DATE	CODE	SERIAL #	ENTRY DATE
03/25/1998		2255951	Mar 25 1998
	TOTAL AMT. RECVD.—CASH (# 98-001184) JAMES ERIKSON [5.00]		
03/25/1998	SMIP	2489825	Mar 25 1998
	SUMMONS ISSUED – PPS [5.00]		
03/26/1998		1772471	Mar 26 1998
	TOTAL AMT. RECVD.—CASH (# 98-001210) JAMES ERIKSON [5.00]		
03/26/1998	SMIP	2251088	Mar 26 1998
	SUMMONS ISSUED—PPS 1-1 DEF/GTA [5.00]		
04/03/1998	SMS	1788770	Apr 8 1998
	SUMMONS SERVED/CM/S/ DANNA DAVIS 3/27/98		
04/06/1998	A	2191089	Apr 8 1998
	ANSWER/DEF		
04/06/1998	TEXT	5075375	Feb 14 2001
	DEFENDANTS 1ST SET OF INTER-ROGATORIES AND REQUESTS FOR PRODUCTION TO PLAINTIFF ----- ENTRY SHOULD HAVE BEEN MADE BY HLH ENTRY MADE FOR PURPOSE OF APPEAL -----		
04/15/1998	OFRJ	2640536	Apr 21 1998
	OFFER TO ALLOW JUDGMENT TO BE TAKEN/DEF		
05/07/1998	OFRJ	2173714	May 13 1998
	OFFER TO ALLOW JUDGMENT TO BE TAKEN/DEF		

DATE	CODE	SERIAL #	ENTRY DATE
05/07/1998	EAA	2186364	May 13 1998
	ENTRY OF APPEARANCE & RESEVERATION OF TIME WHICH TO ANSWER/ PLTF JAMES ERIKSON		
05/27/1998	A	2371437	Jun 3 1998
	DEFENDANTS ANSWERS TO PLAINTIFFS INTERROGATORIES		
07/02/1998	MOCO	2633971	Jul 13 1998
	MOTION TO CONSOLDATE/DEF (CJ 97-2053, 54 & 55)		
07/27/1998		3030270	Jul 29 1998
	MTN OF DEF, DANNA E. DAVIS FOR ORDER WAIVING MED PRIVILEGE & BRIEF 8-31-98 1:30		
08/03/1998		3009629	Aug 6 1998
	SO: MOT TO CONSOLIDATE SUSTAINED INTO CJ-97-2054 .GREGG SMITH, JUDGE		
08/03/1998	A	3046640	Aug 6 1998
	PLTF'S ANSWER TO DEF'S MTN TO CONSOL CASES AND CROSS MOT FOR SEPAR TRIAL TRIA		
09/01/1998		2148377	Sep 8 1998
	SO: MOTION TO WAIVE MED PRIVILEGE SUSTAINED AS PRAY NO RESPONSE OF RECORD *WCH		
09/01/1998	O	2529637	Sep 8 1998
	ORDER *WCH CASE CJ97-2055 CONSOLIDATED WITH THIS CASE		
09/01/1998	O	2986875	Sep 8 1998
	ORDER FOR WAIVER OF MEDICAL PRIVILEGE OF PLTF JAMES ERIKSON *WCH		

DATE	CODE	SERIAL #	ENTRY DATE
09/01/1998	O	3001242	Sep 8 1998
	ORDER FOR WAIVER OF MEDICAL PRIVILEGE OF PLTF PATRICK KILGALLEN *WCH		
09/11/1998		3191810	Sep 17 1998
	REQ FOR RECONSIDERATION OF ORDER GRANTING WAIVER O MEDICAL PRIV & REQ FOR ORDER REQ FOR RECONSIDERATION OF ORDER GRANTING WAIVER OF MEDICAL PRIVILEGE & REQUEST FOR ORDER STAYING PREVIOUS ORDER GRANTING WAIVER OF MEDICAL PRIVELEGE/PLTF		
09/24/1998	RT	2969887	Sep 25 1998
	PLTF'S REQUEST TO COMPEL DISCOVERY		
09/25/1998		1848227	Sep 29 1998
	DEFENDANTS RESPONSES TO PLAINTIFFS REQUESTS FOR PRODUCTION OF DOCUMENTS		
09/25/1998	A	2274679	Sep 29 1998
	DEFENDANTS SUPPLEMENTAL ANSWERS TO PLAINTIFFS INTERROGATORIES		
10/05/1998	O	2250479	Oct 14 1998
	ORDER *WCH* RE: CONSOLIDATED WITH CJ-95-2055		
10/06/1998		2015575	Oct 14 1998
	SO: PLAINTIFFS MOTION TO COMPEL SET 12-14-98 AT 1:30 PM WCH		

DATE	CODE	SERIAL #	ENTRY DATE
11/06/1998	RT	2666026	Nov 13 1998
	DEF'S RESPONSE TO PLTF'S REQUEST TO COMPEL DISCOVERY		
11/25/1998	SDTIP	2681745	Nov 25 1998
	SUBPOENA DUCES TECUM ISS—PPS GTA (1) 12-10-9812:00 P M		
12/02/1998	SDTS	2203321	Dec 7 1998
	SUBPOENA DUCES TECUM SRVD/CM/ CELLULAR ONE DBA AT&T SIGNED RONDA HESTER 12-1-98		
12/04/1998	NOTD	2011867	Dec 9 1998
	NOTICE TAKE DEPOSITIONS OF PLTFS 12-16-98		
12/11/1998	A	1976713	Dec 15 1998
	PLTFS ANSWER TO DEFTS RESPONSE TO COMPEL DISCOVERY AND MOTION TO DISMISS		
12/15/1998		3191809	Dec 17 1998
	SO: PLTFS MOTN TO COMPEL IS HEARD & RULINGS ENTERD AS FOLLOWS #11 OVERRULED...WCH SUMMARY ORDER: 12-14-98 PLAINTIFF'S MOTION TO COMPEL IS HEARD AND RULINGS ENTERED ASFOLLOWS: NO. 11—OVER-RULED NO. 14—SUSTAINED AS PRAYED – NO. 15 – SUSTAINED AS PRAYED-SPECIFIC RECORD FOR THAT MONTH TO BEPROVIDED OR SPECIFIC ANSWER AS TO ACCOUNT NO. WITH AUTHORI-ZATION. NO. 16 – IS OVERRULED. WCH		
12/17/1998	NO	2604306	Dec 23 1998
	NOTICE TO TAKE DEPOSITION		

DATE	CODE	SERIAL #	ENTRY DATE
01/05/1999		3191911	Jan 8 1999
	PLTFS RQST TO STAY INDEPENDENT MEDICAL EXAMINATION FOR P KILGALLEN & J M ERIKSON 3-15-99 1:30 P.M.		
01/15/1999	RT	2983229	Jan 22 1999
	DEF'S RESPONSE TO PLTFS' REQ TO STAY INDEPENDENT MEDICAL EXAM FOR PLAINTIFFS		
01/27/1999		2565710	Feb 2 1999
	SO: HRG OF 3/15/99 RESET BY CT TO 3/8/99 AT 1:30 PM WCH		
02/03/1999		2572989	Feb 4 1999
	MOTION TO ENTER/NMD		
02/04/1999		1914011	Feb 9 1999
	LETTER TO COUNSEL RE ENCLOSED SCHEDULING ORDER *WC		
02/19/1999	LF	2745724	Mar 1 1999
	LETTER TO COUNSEL RE SCHEDULING ORDER		
03/09/1999		3191860	Mar 16 1999
	SO: PLTFS REQUEST TO STAY INDEPENDENT MED EXAMS IS OVERRULED AS PERMANENT . . . WCH SUMMARY ORDER 3-8-99 PLAINTIFF'S REQUEST TO STAY INDEPENDENT MEDICAL EXAMS IS OVERRULED AS PERMANENT INJUNCTIONS ARE ALLEGED AND DEFENDANT IS ENTITLED TO EVALUATE INJURIES THAT PLAINTIFF'S WILL SEEK TO PROVE. WCH		

DATE	CODE	SERIAL #	ENTRY DATE
03/19/1999		2028802	Mar 30 1999
	FOLLOWING DEADLINES ARE SET BY THE COURT		
03/19/1999	O	2070722	Mar 30 1999
	ORDER FOR PRETRIAL CONFERENCE (WCH) 8/6/99 AT 9:00 AM		
06/22/1999	MEO	2484385	Jun 24 1999
	MINUTE ORDER *WCH PTC 8-6-99 RESET 8-10-99 8:30AM		
08/13/1999		3191910	Aug 17 1999
	SO: COUNSEL FOR DEFT APPEARS & ANNOUNCES COUNSEL FOR PLTF ILL PTC RESET AT...WCH SUMMARY ORDER 8-10-99 COUNSEL FOR DEFENDANT APPEARS AND ANNOUNCES COUNSEL FOR PLAINTIFF ILL. PRETRIAL RESET AT REQUEST OF COUNSEL FOR PLAINTIFF AND WITHOUT OBJECTION OF COUNSEL FOR DEFENDANT TO 10-15-99 AT 8:45 A.M. WCH		
09/07/1999	RT	1773676	Sep 9 1999
	RESPONSE TO DEFS APLI TO EXTEND DISCOVERY		
09/30/1999		2426542	Oct 6 1999
	SO: PURSUANT TO FAX FROM COUNSEL, HEARING OF 10-25-99 IS STRICKEN *WCH		
10/15/1999		2402389	Oct 18 1999
	DEFENDANTS REQUESTED JURY INSTRUCTIONS		

DATE	CODE	SERIAL #	ENTRY DATE
10/15/1999		2622454	Oct 18 1999
	DEFENDANTS MOTIONS IN LIMINE		
10/15/1999		3191876	Oct 18 1999
	SO: COUNSEL APPEAR FOR PTC AND FINAL PTO TO BE COMBINED & SUBMITTED FOR...WCH SUMMARY ORDER 10-15-99 COUNSEL APPEAR FOR PRE-TRIAL CONFERENCE AND FINAL PRE-TRIAL ORDER TO BE COMBINED AND SUBMITTED FOR FILING WITHIN TEN DAYS. DEFENDANTS IME AS TO ERIKSON IS GRANTED AND DENIED AS TO KILLGALLENDEFENDANTS MOTION IN LIMINE AS TO X-EXAM OF DEFENDANTS DOCTOR RE: NOT LEAVING EXAMINED PLAINTIFF KILGALLEN IS SUSTAINED-CASE SET FOR NOVEMBER 1, 1999 AT 10:30 A.M. FOR JURYCALL DOCKET-PARTIES TO WAIVE TO SPECIAL JUDGE AT CALL DOCKET. WCH		
10/27/1999		1948288	Oct 29 1999
	PRE-TRIAL CONFERENCE ORDER *WCH JURY CALL DKT 11-1-99 10:30 AM		
11/05/1999	TEXT	5076881	Feb 15 2001
	SUMMARY ORDER—(DATED 11-1-99)—CASE SET FOR JURY TRIAL 11-29-99 @ 8:30AM COURTROOM 2-S. (WCH) (ENTRY SHOULD HAVE BEEN MADE BY DS ENTRY MADE BY LMH—FOR PURPOSE OF APPEAL)		
11/22/1999	SDTIP	2551889	Nov 22 1999
	SUBPOENA DUCES TECUM ISS—PPS (4) GTA		

DATE	CODE	SERIAL #	ENTRY DATE
11/22/1999	SIP	2586260	Nov 22 1999
	SUBPOENA ISSUED – PPS GTA (4) GTA		
12/07/1999		3191842	Dec 8 1999
	SO: BY AGRMENT JURY TRIAL SET FOR 11-29-99 DOCKET IS PASSED TO JANUARY JURY . . . WCH SUMMARY ORDER 12-6-99 BY AGREEMENT JURY TRIAL SET FOR NOVEMBER 29, 1999 DOCKET IS PASSED TO JANUARY JURY TRIAL DOCKET WITH CALL DOCKET OF JANUARY 10, 2000 AT 10:00 A.M. WCH		
12/08/1999		2082157	Dec 8 1999
12/15/1999	TEXT	3618733	Jan 11 2000
	LETTER FROM T. LESLIE BARR TO JUDGE HETHERINGTON RE JURY TRIAL DOCKET		
12/20/1999	TEXT	3628614	Feb 18 2000
	MOTIONS IN LIMINE/PLT'S		
12/22/1999	AC64	3319150	Dec 22 1999
	NEWACCOUNT AC64 ACCOUNT BALANCE – AC13 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $2.00. THE TOTAL PAID ON THIS ACCOUNT IS $2.00. THE BALANCE ON THIS ACCOUNT IS $0.00		
12/22/1999	AC64	3319150	Dec 22 1999
	NEWACCOUNT AC64 ACCOUNT BALANCE – AC13 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $2.00. THE TOTAL PAID ON		

DATE	CODE	SERIAL #	ENTRY DATE
	THIS ACCOUNT IS $2.00. THE BALANCE ON THIS ACCOUNT IS $0.00		
12/22/1999	AC23	3449595	Dec 22 1999 NEWACCOUNT AC23 ACCOUNT BALANCE – ACO3 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $3.00. THE TOTAL PAID ON THIS ACCOUNT IS $3.00. THE BALANCE ON THIS ACCOUNT IS $0.00
12/22/1999	AC23	3449595	Dec 22 1999 NEWACCOUNT AC23 ACCOUNT BALANCE – ACO3 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $3.00. THE TOTAL PAID ON THIS ACCOUNT IS $3.00. THE BALANCE ON THIS ACCOUNT IS $0.00
12/22/1999	AC01	3500763	Dec 22 1999 ACCOUNT BALANCE – AC01 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $79.00. THE TOTAL PAID ON THIS ACCOUNT IS $79.00. THE BALANCE ON THIS ACCOUNT IS $0.00
12/22/1999	AC01	3500763	Dec 22 1999 ACCOUNT BALANCE – AC01 AS OF CONVERSION FROM THE MAINFRAME (12/08/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT $79.00. THE TOTAL PAID ON THIS ACCOUNT IS $79.00. THE BALANCE ON THIS ACCOUNT IS $0.00

DATE	CODE	SERIAL #	ENTRY DATE
01/04/2000	TEXT	3622864	Feb 14 2001
	MOTION FOR SUMMARY JUDGMENT/ PLTF'S/NMD – (ENTRY PREVIOUSLY MADE ON 1-24-00 INCORRECTLY)		
01/04/2000	MOSJ	5076268	Feb 15 2001
	PARTY: ERICKSON, JAMES – MMOTION FOR SUMMARY JUDGMENT/ NMD		
01/10/2000	TEXT	3622865	Jan 14 2000
	SO: CASE SET FOR JURY TRIAL 1/4/00 8:30 AM. PARTIES WAIVE TO SPECIAL JUDGE *TAL*		
01/10/2000	TEXT	3622866	Jan 14 2000
	DEF'S SUPPLEMENTAL JURY INSTRUCTIONS		
01/19/2000	RT	4212143	Feb 15 2000
	RESPONSE TO SUMMARY JUDGMENT		
01/20/2000	TEXT	3628659	Jan 21 2000
	BRIEF IN SUPPORT OF PLTF'S MOTIONS IN LIMINE/PLT		
01/20/2000	MOLIM	5076541	Feb 15 2001
	MOTION IN LIMINE – PLAINTIFF'S ERIKSON / KILGALLEN ENTRY SHOULD HAVE BEEN MADE BY HLH		
01/24/2000	TEXT	4215728	Feb 17 2000
	PLAINTIFFS REQUESTED JURY INSTRUCTIONS		
01/25/2000	TEXT	4218055	Feb 14 2001
	MOTIONS IN LIMINE – (PLTF'S 2ND FILING) – (ORIGINAL ENTRY 2-17-00 BY PHYLLIS HOLLOWAY) DATE ENTRY		

DATE	CODE	SERIAL #	ENTRY DATE
	ERROR – ENTRY MADE AS 1/20/00) (CORRECTION MADE FOR PURPOSE OF APPEAL)		
01/25/2000	TEXT BRIEF IN SUPPORT OF DEFENDANT'S MOTIONS IN LIMINE	4218060	Feb 17 2000
01/25/2000	TEXT PLAINTIFFS' WITNESS AND EXHIBIT LIST	4218063	Feb 17 2000
01/25/2000	TEXT JURY INSTRUCTIONS (PROPOSED)	4218066	Feb 19 2000
01/25/2000	TEXT PREMPTORY CHALLENGES	4218071	Feb 17 2000
01/25/2000	MO DEF'S MOTION IN LIMINE	4221834	Feb 19 2000
01/25/2000	JL JURY LIST (EMPANEL JUROR AND SWEAR TO TRY CAUSE)	4260268	Mar 13 2000
01/25/2000	MOLIM MOTION IN LIMINE – PLAINTIFF'S ORIGINAL ENTRY SHOULD HAVE BEEN MADE BY PAH	5076309	Feb 15 2001
01/28/2000	TEXT SO: PARTIES ANNOUNCE READY FOR TRIAL. CASE ASSIGNED TO SPECIAL DISTRICT JUDGE. (WCH	4218509	Feb 18 2000
01/31/2000	SS SUBPOENA SERVED/CM/DR WILLIAM P HARRIS/SB MICHELLE WATAHOUSE/ 1-21-00	4224655	Feb 22 2000

DATE	CODE	SERIAL #	ENTRY DATE
02/04/2000	TEXT	4230415	Feb 25 2000
	PLAINTIFFS' REQUESTED JURY INSTRUCTIONS (NOTE: JURY INSTRUCTIONS DISC IS ATTACHED TO THIS PLEADING IN A BROWN ENVELOPE.)		
05/30/2000	MOLIM	4385675	Jun 8 2000
	MOTIONS IN LIMINE/PLAINTIFFS		
05/30/2000	B	4385677	Jun 8 2000
	BRIEF IN SUPPORT OF PLTFS' MOTION IN LIMINE		
06/02/2000	LF	4393685	Jun 13 2000
	LETTER FILED TO JUDGE HETHERINGTON FROM MARK WOODARD'S OFFICE MANAGER		
06/02/2000	TEXT	4393686	Jun 13 2000
	SO: CASE SET ON JURY CALL DOCKET 6-5-00 @ 10:00 AM. PLTF'S DOCTOR'S LETTER OF 5-30-00 DOES NOT PROVIDE ANY PROOF OR REASON WHY THIS DOCTOR CANNOT BE AVAILABLE TO TESTIFY PER SUBPOENA WHEN REQUIRED TO DO SO. *WCH		
06/06/2000	TEXT	4393687	Jun 13 2000
	SO: CASE SET FOR JURY TRIAL 6-19-00 8:30 AM. *RLB		
06/15/2000	RT	4398675	Jun 16 2000
	PARTY: DAVIS, DANNA ELIZABETH DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTIONS IN LIMINE		
06/16/2000	TEXT	4400671	Jun 19 2000
	SO: CASE STRICKEN FROM JURY TRIAL SETTING OF 6-19-00 AND RESET FOR		

DATE	CODE	SERIAL #	ENTRY DATE
	JURY TRIAL ON 6-26-00 AT 8:30 AM. PARTIES TO REPORT TO JUDGE HETHERINGTON FOR JURY TRIAL CALL AT THAT TIME TO BE ASSIGNED FOR TRIAL *TAL		
06/16/2000	APLI	4400673	Jun 19 2000
	EX PARTE APPLICATION FOR CONTINUANCE		
06/26/2000	TEXT	4436050	Jul 13 2000
	EMPANEL JURY AND SWEAR TO TRY CAUSE		
06/26/2000	JL	4436051	Jul 13 2000
	FILING JURY LIST		
06/26/2000	TEXT	4436065	Jul 13 2000
	JURY FEE JURY HELD 6/26/00($ 50.00)		
06/26/2000	TEXT	4436073	Jul 13 2000
	REPORTER FEE JURY TRIAL 6/26/00 ($ 20.00)		
06/26/2000	CHAB	4449988	Jul 17 2000
	C.H.A.B. STATUTORY FEE ($ 10.00)		
06/28/2000	TEXT	4449932	Jul 17 2000
	SO: CASE ASSIGNED TO JUDGE RING FOR JURY TRIAL THIS DATE. (WCH)		
06/28/2000	TEXT	4449935	Jul 17 2000
	SO: PARTIES APPEAR AND JURY TRIAL HELD ON JUNE 26 AND 27, 2000. JURY RETURNED WITH A VERDICT IN FAVOR DEFENDANT. DEFENDANT TO PREPARE JOURNAL ENTRY. CASE CONSOLIDATED FOR JURY TRIAL WITH CJ-97-2055(RR)		

DATE	CODE	SERIAL #	ENTRY DATE
06/28/2000	TEXT	4449936	Jul 17 2000
	INSTRUCTIONS TO JURY		
06/28/2000	TEXT	4449937	Jul 17 2000
	BLUE VERDICT FORM NOT USED (RR)		
06/28/2000	TEXT	4449944	Jul 17 2000
	PINK VERDICT FORM		
06/28/2000	DISPJD	4449948	Jul 17 2000
	PARTY: ERICKSON, JAMES M		
07/20/2000	ACCOUNT	4457210	Jul 20 2000
	PARTY: KILGALLEN, PATRICK		
	RECEIPT # 2000-29423 ON 07/20/2000		
	PAYOR: ERIKSON, JAMES M TOTAL AMOUNT PAID: $ 80.00.		
	LINE ITEMS:		
	CJ-1997-2054: $20.00 ON AC06 COURT REPORTER FEES CRIMINAL ONLY FOR KILGALLEN, PATRICK.		
	CJ-1997-2054: $50.00 ON AC09 JURY FEES CIVIL AND CRIMINAL FOR KILGALLEN, PATRICK. CJ-1997-2054: $10.00 ON AC69 CHILD ABUSE MULTIDISCIPLINARY FEE FOR KILGALLEN, PATRICK.		
07/25/2000	TEXT	4472804	Aug 2 2000
	MOTION TO TAX COSTS		
08/15/2000	DISBURSED	4490864	Aug 15 2000
	CHECK# 7058 PRINTED TO COURT FUND IN THE AMOUNT OF $ 20.00 TO PAY AC06 – COURT REPORTER FEES CRIMINAL ONLY.		

DATE	CODE	SERIAL #	ENTRY DATE
08/15/2000	DISBURSED	4491133	Aug 15 2000
	CHECK# 7060 PRINTED TO COURT FUND IN THE AMOUNT OF $ 50.00 TO PAY AC09 – JURY FEES CIVIL AND CRIMINAL.		
08/15/2000	DISBURSED	4496103	Aug 15 2000
	CHECK# 7087 PRINTED TO DEPT OF HUMAN SERVICES-CAM ACCOUNT IN THE AMOUNT OF $ 10.00 TO PAY AC69 – CHILD ABUSE MULTIDISCIPLINARY FEE.		
08/22/2000	MO	4518154	Sep 1 2000
	PARTY: DAVIS, DANNA ELIZABETH MOTION TO SETTLE JOURNAL ENTRY 9-25-00 1:30 PM		
08/23/2000	TEXT	4519792	Sep 5 2000
	PLAINTIFFS' OBJECTION TO DEFENDANTS MOTION TO TAX COSTS AND PLAINTIFFS' MOTION FOR JNOV; OR ON THE ALTERNATIVE, MOTION FOR NEW TRIAL; AND MOTION FOR SANCTIONS		
08/25/2000	TEXT	4555890	Sep 7 2000
	MOTION TO TAX COSTS & JNOV 10-3-00 2:00 PM. JUDGE RING MUST DO *RDG		
08/29/2000	TEXT	4518290	Sep 1 2000
	SO: ARGUMENT TAKEN ON DEFENDANTS MOTION TO TAX COSTS. CASE HELD UNTIL HEARING ON PLAINTIFFS MOTIONS. *R. R.*		
09/06/2000	MOQ	4591544	Sep 18 2000
	MOTION TO QUASH AND/OR MOTION FOR PROTECTIVE ORDER		

DATE	CODE	SERIAL #	ENTRY DATE
09/06/2000	RT	4591552	Sep 18 2000
	DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR JNOV; OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL; AND MOTION FOR SANCTIONS		
09/08/2000	SDTS	4583913	Sep 13 2000
	SUBPOENA DUCES TECUM SERVED HOMELAND PHARMACY ON 09-01-00.		
09/08/2000	SDTS	4583941	Sep 13 2000
	SUBPOENA DUCES TECUM SERVED DANA ELIZABETH DAVIS-LAUDERDALE ON 09-01-00.		
09/13/2000	TEXT	4605776	Sep 28 2000
	SO: DEF'S MOTION TO SETTLE J E SET FOR 9-25-00 (MOTION DOCKET) MOVED TO 10-3-00 BEFORE JUDGE RING @ 2:00 P.M. *WCH		
09/14/2000	TEXT	4599684	Sep 25 2000
	SO: DEFENDANT'S MOTION TO SETTLE J E SET BEFORE JUDGE HETHERINGTON ON (MOTION DOCKET) 9-25-00 IS STRICKEN TO BE RESET BEFORE JUDGE RING *WCH		
09/22/2000	AFD	4599800	Sep 25 2000
	AFFIDAVIT/SUBPOENA DUCES TECUM BY CERTIFIED MAIL Z 185 993 076 TO SCHROEDER & MIDDLETON SIGNED ON 09-20-00.		
09/26/2000	R	4643744	Oct 13 2000
	PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO MOTION TO TAX COSTS AND PLAINTIFFS' MOTION FOR JNOV;		

DATE	CODE	SERIAL #	ENTRY DATE
	OR ON THE ALTERNATIVE, MOTION FOR NEW TRIAL; AND MOTION FOR SANCTIONS		
10/03/2000	JEJ	46611769	Oct 19 2000
	JOURNAL ENTRY OF JUDGMENT JUDGMENT JURY VERDICT/RR		
11/08/2000	TEXT	4694872	Nov 15 2000
	APPELLANT'S PETITION IN ERROR		
11/08/2000	DOR	4694874	Nov 15 2000
	PARTY: ERICKSON, JAMES M DESIGNATION OF RECORD FOR APPEAL FROM DISTRICT COURT ($ 100.00)		
11/13/2000	TEXT	4696584	Nov 16 2000
	SUMMARY ORDER: 10-3-2000 PARTIES APPEAR THROUGH COUNSEL AND HEARING HELD ON PARTIES MOTIONS. ARGUMENT TAKEN AND CONSIDERED. MOTIONS TAKEN UNDER ADVISEMENT UNTIL 10-13-2000 AT 4:00 P.M. RR		
11/13/2000	TEXT	4696601	Nov 16 2000
	SUMMARY ORDER: 11-9-2000 PARTIES APPEARED THROUGH COUNSEL AND ARGUMENT TAKEN ON MOTIONS ON 10-3-2000. AFTER CONSIDERATION OF ARUGMENTS AND PLEADINGS THE COURT FINDS: 1. PLAINTIFF'S MOTION FOR JNOV OR IN THE ALTERNATIVE FOR A NEW TRIAL'IS OVERRULED. 2. PLAINTIFF'S MOTION FOR SANCTIONS IS OVERRULED. 3. DEFENDANTS MOTION TO SETTLE JOURNAL ENTRY IS MOOT. 4. DEFENDANT'S MOTION TO TAX COSTS IS SUSTAINED. RR		

DATE	CODE	SERIAL #	ENTRY DATE
11/13/2000	TEXT	4696607	Nov 16 2000
	LETTER *FILED WITH EXHIBITS/T.* LESLIE E3ARR TO JUDGE RING		
11/17/2000	TEXT	4950287	Nov 22 2000
	CERTIFICATE OF APPEAL #DF-95469		
11/27/2000	TEXT	4951197	Nov 27 2000
	NOTICE OF FILING – RANDI BYERS		
11/27/2000	T&2	4951200	Nov 27 2000
	ORIGINAL TRANSCRIPT &2 COPIES OF PROCEEDINGS HELD 8-29-00 – FILED BY RANDI BYERS		
11/27/2000	T&2	4951212	Nov 27 2000
	ORIGINAL TRANSCRIPT & 2 COPIES OF PROCEEDINGS HELD 10-3-00 BY RANDI BYERS		
11/27/2000	MOD	4958777	Dec 1 2000
	PARTY: DAVIS, DANNA ELIZABETH MOTION TO DISMISS APPEAL		
11/27/2000	EAA	4966970	Dec 5 2000
	ENTRY OF APPEARANCE/DANA ELIZABETH DAVIS BY ATTORNEY WILLIAM D. PETTIGREW		
11/30/2000	TEXT	4957034	Nov 30 2000
	DIRECTIVE FROM SUPREME COURT –		
	APPELLANT IS DIRECTED TO RESPOND NOT LATER THAN DECEMBER 5, 2000 TO APPELLEES MOTION TO DISMISS – CHIEF JUSTICE HARDY SUMMERS		
12/11/2000	ACCOUNT	4976423	Dec 11 2000
	PARTY: ERICKSON, JAMES M		

DATE	CODE	SERIAL #	ENTRY DATE
	RECEIPT # 2000-42955 ON 12/11/2000.		
	PAYOR: T LESLIE BARR TOTAL AMOUNT PAID: $ 100.00.		
	LINE ITEMS:		
	CJ-1997-2054: $100.00 ON AC01 CLERK'S FEES CIVIL AND CRIMINAL FOR ERIKSON, JAMES M.		
12/18/2000	JE	4988937	Dec 28 2000
	JOURNAL ENTRY *RR		
12/18/2000	TEXT	4988940	Dec 28 2000
	AMENDED DESIGNATION OF RECORD FOR APPEAL FROM DISTRICT COURT		
12/18/2000	TEXT	4988946	Dec 28 2000
	APPELLANT'S AMENDED PETITION IN ERROR		
01/03/2001	EAA	4996415	Jan 4 2001
	PARTY: DAVIS, DANNA ELIZABETH		
	ENTRY OF APPEARANCE/WILLIAM D. PETTIGREW ATTY FOR DANNA ELIZABETH DAVIS		
01/03/2001	RESP	4996420	Jan 4 2001
	PARTY: DAVIS, DANNA ELIZABETH		
	RESPONSE TO SUPPLEMENTAL PETITION IN ERROR		
01/03/2001	TEXT	4996457	Jan 4 2001
	APPELLEE'S COUNTER DESIGNATION OF RECORD		
01/11/2001	DISBURSED	5009083	Jan 11 2001
	CHECK# 8055 PRINTED TO COURT FUND		

DATE	CODE	SERIAL #	ENTRY DATE
	IN THE TOTAL AMOUNT OF 73,017.01. INCLUDING: $ 100.00 AC01 – CLERK'S FEES CIVIL AND CRIMINAL FOR ERIKSON, JAMES M		
02/15/2001	TEXT	5077446	Feb 15 2001
	NOTICE OF NON-COMPLETION-W/ COPY OF DOCKET SHEET ATTACHED PROBLEM W/LOCATING CORRECT PLEADINGS DESIGNATED ON AMENDED DESIGNATION OF RECORD-COPIES MAILED TO SUPREME COURT/WILLIAM PETTIGREW/T LESLIE BARR – SUPREME COURT CASE # 95469		
03/23/2001	TEXT	5138582	Mar 26 2001
	NOTICE OF FILING – FELICIA A NEWLAND (ADAMS)		
03/23/2001	T&2	5138585	Mar 26 2001
	ORIGINAL TRANSCRIPT & 2 COPIES OF PROCEEDINGS HELD JUNE 26TH AND 27TH 2000 – FILED BY FELICIA A NEWLAND (ADAMS) – VOLUME I / II		
03/23/2001	TEXT	5138637	Mar 26 2001
	EXHIBITS DEFENDANT'S / PLAINTIFF'S / COURT'S (1 ORIGINAL PACKET)		
05/15/2001	MO	5218258	May 16 2001
	PARTY: DAVIS, DANNA ELIZABETH MOTION FOR BRIEFING SCHEDULE OR IN THE ALTERNATIVE TO DISMISS APPEAL/NO DATE		
05/23/2001	TEXT	5227167	May 23 2001
	CLERK'S NOTE: WILLIAM PETTIGREW – CHECKED OUT HIS CASE FILE (4) COPY		

DATE	CODE	SERIAL #	ENTRY DATE
	TRANSCRIPTS OF PROCEEDINGS HELD: 10-3-00 / 8-29-00 / 6/26-27/00 VOLUME I & II		
05/23/2001		5236066	May 31 2001
	MOTION TO REQUIRE SUPERSEDES BOND / 7-16-2001 1:30 P.M.		
05/29/2001	TEXT	5233389	May 29 2001
	ATTORNEY'S LIEN CLAIMED		
05/29/2001	TEXT	5233390	May 29 2001
	JURY TRIAL DEMANDED		
06/06/2001	APLI	5261539	Jun 11 2001
	PARTY: DAVIS, DANNA ELIZABETH APPLICATION FOR ORDER OF DISMISSAL		
06/11/2001	RESP	5263653	Jun 11 2001
	PARTY: ERICKSON, JAMES M APPELLANT'S RESPONSE TO NOTICE OF NONCOMPLETION OF RECORD		
06/27/2001	TEXT	5291101	Jun 27 2001
	DIRECTIVE FROM SUPREME COURT – COUNSEL FOR APPELLANT IS DIRECTED TO OKLA. SUP. CT. R. 1.28 WHICH STATES THAT APPELLANT HAS THE BURDEN TO SECURE TIMELY NOTICE OF COMPLEITON OF. RECORD. THE COURT NOTES NO RESPONSE TO CLERK'S NOTICE OF NON-COMPLETION FILED FEBRUARY 20, 2001 OR THIS COURT'S ORDER OF MAY 17, 2001 UNTIL 4 MONTHS AFTER NOTICE OF NON-COMPLETION. THE COURT		

DATE	CODE	SERIAL #	ENTRY DATE
	FURTHUR NOTES NO MOTION FOR ADDITIONAL TIME AS REQUIRED BY OKLAHOMA SUPREME COURT RULES. APPELLANT MAY PROCEED IN TRIAL COURT TO SECURE IMMEDIATE NOTICE OF COMPLETION OF RECORD WHICH IS NOW 2 MONTHS PAST DUE. SEE ORDER OF MAY 17, 2001.		
07/12/2001	TEXT	5309738	Jul 24 2001
	***** ERROR *****		
07/16/2001	TEXT	5317690	Jul 18 2001
	SUMMARY ORDER – DEF'S REQUEST FOR SUPERSEDES BOND IS SUSTAINED AS PRAYED IN TWICE THE AMOUNT OF JUDGMENT (WCH)		
07/16/2001	O	5317698	Jul 18 2001
	ORDER (RE SUPERSEDES BOND) – WCH (RE BOND REQUEST FROM JAMES ERIKSON – $5,061.28; PATRICK KILGALLEN – $1,498.96)		
07/16/2001	TEXT	5317701	Jul 18 2001
	REQUEST FOR STAY		
07/16/2001	DOR	5317707	Jul 18 2001
	PARTY: ERICKSON, JAMES M AMENDED DESIGNATION OF RECORD		
07/24/2001	TEXT	5330147	Jul 27 001
	APPELLEE'S AMENDED COUNTER DESIGNATION OF RECORD		
07/25/2001	TEXT	5325501	Jul 25 2001
	NOTICE OF COMPLETION W/INDEX OF RECORD ATTACHED – COPIES MAILED		

DATE	CODE	SERIAL #	ENTRY DATE
	TO SUPREME COURT / WILLIAM PETTIGREW / LESLIE BARR		
07/25/2001	TEXT COURT CLERK'S CERTIFICATION OF RECORD ON APPEAL	5325510	Jul 25 2001
08/29/2001	APLI PARTY: ERICKSON, JAMES M APPLICATION FOR STAY	5382205	Sep 4 2001
09/04/2001	RESP PARTY: DAVIS, DANNA ELIZABETH RESPONSE TO APPLICATION FOR STAY	5387075	Sep 6 2001
09/20/2001	R PARTY: ERICKSON, JAMES M REPLY TO RESPONSE TO APLI FOR STAY	5411703	Sep 25 2001
09/25/2001	SUMMARY ORDER: 9-21-2001 REQUEST FOR STAY IS SET 11-5-2001 AT 1:30 P.M. (MOTION DOCKET). WCH	5413279	Sep 26 2001
11/05/2001	SUMMARY ORDER: 11-5-2001 DEFENDANT'S REQUEST TO "STAY" POSTING OF SUPERSEDEAS BOND AND TO STAY EXECUTION ON JUDGMENT IS SUSTAINED IN PART AND OVERRULED IN PART AS MOTION TO STAY EXECUTION IS SUSTAINED PENDING APPEAL AND MOTION TO STAY SUPERSEDEAS IS SUSTAINED IN PART IN THAT PLAINTIFF'S ARE ORDERED TO POST A TOTAL OF $4,000.00. WCH	5466340	Nov 6 2001

DATE	CODE	SERIAL #	ENTRY DATE
11/15/2001	TEXT	5479756	Nov 15 2001
	PARTY: ERICKSON, JAMES M BOND FEE ($ 3.00)		
11/15/2001	BOND	5479776	Nov 15 2001
	PARTY: ERICKSON, JAMES M BOND: $4,000.00 FOR JAMES ERIKSON & PATRICK KILGALLEN($ 4000.00)		
11/15/2001	ACCOUNT	5479787	Nov 15 2001
	PARTY: ERICKSON, JAMES M RECEIPT # 2001-77893 ON 11/15/2001. PAYOR: JAMES M. ERIKSON PC TOTAL AMOUNT PAID: $ 4,003.00. LINE ITEMS: CJ-1997-2054: $3.00 ON AC01 CLERK'S FEES CIVIL AND CRIMINAL FOR ERIKSON, JAMES M. CJ-1997-2054: $4,000.00 ON AC90 (FORMERLY HC01) CASH BONDS FOR ERIKSON, JAMES M.		
02/04/2002	MO	5571912	Feb 5 2002
	PARTY: DAVIS, DANNA ELIZABETH APPELLEE'S FOURTH MOTION TO DISMISS		
03/04/2002	TEXT	5612560	Mar 4 2002
	CLERK'S NOTE: RUNNER FOR T. LESLIE BARR PICKED UP COPY TRANSCRIPTS OF PROCEDDINGS HELD 6/26-27/00 VOLUME I & II / 10-3-00 / 8-29-00 THIS DATE (LMH)		

Party	Original Balance	Paid to Date	Cash Bonds	Holding	Current Balance
Erikson, James M	$ 4103.00	$ 4103.00	$ 4000.00	$ 0.00	$ 4000.00
Davis, Danna Elizabeth et al	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Kilgallen Patrick	$ 80.00	$ 80.00	$ 0.00	$ 0.00	$ 0.00
Generic Party	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Balance	$ 4183.00	$ 4183.00	$ 4000.00	$ 0.00	$ 4000.00

Report Generated by The Oklahoma Court Information System at March 05, 2002 11:34:24.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed Jan 14 2003]

CIV 02-1117-L

JAMES M. ERIKSON and PATRICK KILGALLEN,
Plaintiffs,

vs.

FARMERS GROUP, INC, (A Nevada Corporation) and Affiliated Companies; D-B-A THE FARMERS INSURANCE GROUP OF COMPANIES® and Affiliated Companies; All Defendants Jointly and Severally,

Defendants.

SECOND AMENDED COMPLAINT

IN RESPONSE TO SHOW CAUSE ORDER

1. Plaintiffs, James Erikson and Patrick Kilgallen, bring this civil action as a result of breaches of their medical confidentiality, in which Farmers Group, Inc., ("Farmers"), their employees, attorneys and/or agents, through means of fraud, misrepresentation and/or deceit, and/or in bad faith, conspired to unlawfully procure, disclose to third parties and/or store all of Patrick and James' medical records. Patrick and James were involved in a traffic accident and suffered injuries and property damage. As a result of said accident, Pat and James made a claim against the insured of Farmers, which Farmers refused to pay. Farmers through its employees and agents, published privileged medical information of Patrick and James to third persons. The Defendants have conspired; or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of

unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law.

I. JURISDICTION

2. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331; diversity jurisdiction under 28 U.S.C. § 1332(c)1; and supplemental jurisdiction under 28 U.S.C. §1367.

II. VENUE

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a), (b) and (c) because the operative facts giving rise to the causes of action occurred in the Western District of Oklahoma and the corporation has sufficient contacts with this district.

III. PARTIES

A. Plaintiffs

4. James Erikson is a citizen of the State of Oklahoma residing in Norman, Oklahoma;

5. Patrick Kilgallen is a citizen of the state of Oklahoma residing at Norman, Oklahoma.

B. Defendants

6. Farmers Group, Inc. ("Farmers") Is a Nevada corporation -with its principle headquarters in California and doing business under many names such as Farmers INSURANCE GROUP OF COMPANIES®) and as employer, owner and/or contractor with the Oklahoma firm of Dobbs and Middleton which represents on its letterhead: "Employees of the Litigation Department of Farmers Insurance Group of Companies." Farmers is in the business of selling insurance in the State of Oklahoma as well as other states. Farmers may be served with process through its registered agent within the State of Oklahoma at the Oklahoma Insurance Commis-

sioner, Carroll Fisher, 2401 N.W. 23rd Street, Oklahoma City, Oklahoma 73107.

7. Farmers Group, Inc., does business as Farmers Insurance Group of Companies®) which owned, employed, or authorized the agents and/or contracted with Dobbs and Middleton ("not a partnership") and are not licensed or certified with the Oklahoma Secretary of State as a corporation, company or partnership, and also may be considered a loose association. They may be served with process Farmers may be served with process through its registered agent within the State of Oklahoma at the Oklahoma Insurance Commissioner, Carroll Fisher, 2401 N.W. 23rd Street, Oklahoma City, Oklahoma 73107.

IV. GENERAL ALLEGATIONS

8. On or about October 7, 1995, James Erikson and Patrick Kilgallen were passengers in an automobile which was rear-ended by Dana Davis-Lauderdale. Patrick and James suffered mostly soft-tissue injuries, and the eye-glasses Patrick was wearing were broken from the impact of the two automobiles. Both Patrick and James were treated by their respective medical providers for said injuries and released within a matter of a few months.

9. Patrick and James timely made claims against the liability insurance policy carried by Davis-Lauderdale, Farmers Insurance, for payment of their related property and medical expenses. Farmers and Davis-Lauderdale refused to pay said medical expenses, and suit was brought in the State District Court of Cleveland County, where the accident occurred.

10. During the discovery phase of the litigation, Farmers, through Dobbs and Middleton through its employees, attorneys and/or agents, obtained a state court order partially waiving medical privilege of Patrick and James, restricted to the areas of the body at issue in the litigation and Pursuant to

Oklahoma Statutes Title 76 at section 19, which waives the medical privilege to the areas of the body at issue in a suit.

11. Unknown to Patrick and James, Farmers, through Dobbs and Middleton, through its employees, attorneys and/or agents, conspired and/or sent letters to all of the medical providers of Patrick and James, misrepresenting and stating that the attached court order entitled the Defendants to all medical records, "every page." Said communications were sent through use of the U.S. Mail and/or across wire communications, and across state lines. Said letters were sent on letterhead emblazoned with Dobbs and Middleton, Employees of the Litigation Department of Farmers Group of Insurance Companies, and signed by authority of Farmers. See example of one of numerous letters sent to medical providers of James Erikson attached hereto as Exhibit A. See also example of one of numerous letters sent to medical providers of Patrick Kilgallen attached hereto as Exhibit B. See also Order Waiving Medical Privilege of James Erikson, and Patrick Kilgallen, attached hereto as Exhibits C and D respectively. As a result of said misrepresentations, bad faith and/or fraud on the part of the Defendant, the Defendants were able to procure all medical records of Patrick and James, from the several medical providers whom complied with said letters.

12. During possession of said records, Defendants published and provided the medical records to known and unknown third parties, including Defendant's hired outside witnesses familiar with medical terminology. At trial, Defendant made known to the court, the jurors and general public in attendance confidential medical information including but not limited to injuries suffered as a result of a taxi-cab accident which occurred when one of the men was underage in the 1940's, one of the men had at one point was prescribed the medication Prozac, which had unrelated to the case at issue, and that one of the men had been prescribed massage therapy

many years previously, also unrelated to the case at issue. The Defendant also made defamatory statements against James as an attorney. (James had not entered an appearance in this matter). None of which was relevant to the 1995 automobile accident. As a result of these revelations of their confidential medical records, Patrick and James were unduly embarrassed, surprised and taken aback and were thereby defamed. The jury found in favor of the Defendant. Patrick and James were subsequently assessed the costs of the action by the trial court as the non-prevailing party.

13. One of James' medical providers, Dr. Thomas Hoffmeyer from the State of Virginia, later provided a copy of the letter he had received on behalf of Farmers; dated September 3, 1998. In response to a subsequent Subpoena Duces Tecum, Dobbs and Middleton on behalf of Defendant Farmers provided copies of the letters sent to Patrick and James' medical providers. Examples of said letters are attached hereto as Exhibits A and B.

14. On or about September 3, 1998, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed a letter to be mailed via United States Postal Service to Dr. Jonathan Schwartz, a health-care provider for James, a copy of which letter is attached as Exhibit A, which stated in pertinent part as follows:

> "Enclosed please find a [sic] Order for Waiver of Medical. Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills *or other information contained in the patient's chart or file*, Please understand that this request is for copies of

existing records only, and no request is being made at this time for a new narrative report."

15. On or about January 12, 1999, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed a letter to be mailed via United States Postal Service to Presbyterian Hospital, a health-care provider for Erikson, a copy of a similar letter is attached as Exhibit A, which stated in pertinent part language similar to that referenced in paragraph 14 above.

16. Upon information and belief, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed letters containing similar language, on or about the dates referenced in paragraphs 14 and 15 above, to be mailed via United States Postal Service to various health-care providers for Erikson and/or Kilgallen, including without limitation the following healthcare providers:

Kilgallen:

USAF Hospital Tinker AFMC
Homeland Pharmacy
Norman Physician Group
Norman Regional Hospital
Goddard Health Center

Erikson:

Dr. David Vrquia
Dr. Terry Whipple
Dr. Matthew Fergusor.
Dr. Roshbaum/Physicians Home Services
Lynchburg General Hospital
Duke University Medical Center
Dr. Charles Joseph
Williamsburg Community Hospital
Dr. John Grasinger
Benjamin Knight, Jr., D.D.S.

Dr. Hager
University Hospital
Norman Neurology
Rehab Assoc. off Central VA
Dr. Jonathan Swartz
Duke University Medical Center
Norman Physicians Group
Dr. Laurence Alltshuler
Dr. James Rodman
Dr. William Frank
Baptist Medical Center
Bone & Joint Hospital
Deaconess Hospital
Dr. Thomas Hoffmeyer
Dr. Wiggs
Dr. Jones Foster
UVA Hospital
Rendezvous in the Park, Inc.
Associated Physical Therapists
Norman Regional Hospital
Goddard Health Center
Dr. Grinaldi
Homeland Pharmacy
Midwest City Regional Hospital
Presbyterian Hospital
Southwest Medical Center of Oklahoma
St. Anthony's Hospital
The University Hospitals
Edmond Regional Hospital
Hillcrest Health Center
Mercy Health Center

17. The letters referenced in paragraphs 14 through 16 were fraudulent insofar as they stated or implied that a court had authorized or ordered the release of medical records that did not pertain to Plaintiffs' injuries sustained in the automobile accident that occurred on or about October 7, 1995.

18. Upon information and belief, acting as agents for Farmers and Dobbs and Middleton, said agents caused and/or allowed wire communications to be made to certain health-care providers for Plaintiffs Erikson and/or Kilgallen, at or near the times when the referenced letters were mailed, seeking medical records of Erikson and/or Kilgallen through the use of representations that were fraudulent insofar as they stated or implied that a court had authorized or ordered the release of medical records that did not pertain to Plaintiffs' injuries sustained in the automobile accident that occurred on or about October 7, 1995, including without limitation wire communications to the following health-care providers:

V. FIRST CLAIM FOR RELIEF:

(RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) UNDER 18 U.S.C. §§ 1961-1968)

The referenced wire and mail communications constituted wire fraud pursuant to 18 § 1343 and/or mail fraud pursuant to 18 U.S.C. § 1341, and a pattern of racketeering activity as defined in 18 U.S.C. § 1961(1) and (5).

19. Defendants Farmers Group and D-B-A Farmers Group of Insurance Companies D-B-A Dobbs and Middleton, in conducting said wire and/or mail fraud, operated an enterprise as defined in 18 U.S.C. § 1961(4).

20. As a result of such wire and/or mail fraud, which was relied upon by health- care providers who released Plaintiffs' medical records, the Plaintiffs' business and/or property interests were injured through, without limitation, adverse effects on Plaintiffs' businesses, economic loss, and property damage.

21. Pursuant to 18 U.S.C. § 1964(c), on the basis of their civil RICO claim, Plaintiffs are entitled to recover treble damages, reasonable attorney's fees, and costs of suit.

22. Wherefore, Plaintiffs demand judgment for relief as set forth below in their Prayer for Relief.

VI. SECOND CLAIM FOR RELIEF:

(MAIL AND/OR WIRE FRAUD)

The allegations contained in paragraphs I through 24, and paragraphs 25 through 48 are incorporated in this count.

23. The elements of mail and/or wire fraud are 1. scheme to defraud; and 2. mailing of a letter for the purpose of executing the scheme. 18 USC §§ 1341 § 1342 & § 1343.

24. The Defendants sent letters and/or communications with the intent to get all medical records of Patrick and James. Said letters intentionally represent that all medical records, (every page) should be provided to the Defendants to wit: "Enclosed please find an Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills *or other information contained in the patient's chart or file.* Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report" See paragraph 1 of letter from Richard J. Bruce of Dobbs and Middleton, Employees of the Litigation Department of the Farmers Group of Insurance Companies, dated Sept. 3, 1998, attached hereto as Exhibit A. Letters with identical wording were sent to Patrick's medical providers by the Defendants, see Exhibit B.

25. The Defendants' acts were planned, deliberate and improper. Defendant's acts show a reckless disregard and callous indifference for the rights of others.

26. As licensed attorneys, Farmers neglected their duty not to assist a client in making false representations and to protect the medical privilege. Farmers neglected to stop the conspiracy.

VII. THIRD CLAIM FOR RELIEF:

(Violation of the State Insurance Code and Common-Law Cause of Action for Misrepresentation Against Farmers Group, Inc., et al.)

27. The allegations contained in paragraphs 1 through 21 are incorporated in this count.

28. Farmers are engaged in the business of insurance in the State of Oklahoma. Farmers has engaged in unfair practices in the business of insurance by representing to the Plaintiffs and to members of the public that it would deal fairly and in good faith when conducting the business of insurance. The Plaintiffs were harmed by Farmers, its employees, and/or agents who coordinated acts to obtain Plaintiffs' privileged medical documents and to utilize same to receive financial and economic benefit. Farmers, its employees, and/or agents, acting as attorneys, had a duty to comply with Plaintiffs' medical privilege, as well as the court's order but chose instead to use said information against the Plaintiffs.

29. Farmers also engaged in the unlawful insurance practice of discriminating against the Plaintiffs on the basis of their condition, diagnosis, and disability, which were years before and unrelated to the accident at issue.

30. As a result of the misconduct alleged in this count, Plaintiffs have sustained personal injuries and/or economic damages.

31. Wherefore, Plaintiffs demand judgment for relief as set forth below in their Prayer for Relief.

VIII. FOURTH CLAIM FOR RELIEF

(Invasion of Privacy by Intrusion)

32. The allegations contained in paragraphs 1 through 21 are incorporated in this count.

33. Farmers Group of Insurance Companies and Dobbs and Middleton acted and/or operated as an agent or employee of Farmers, such agents or employees acted within the scope of such employment.

34. Farmers and Dobbs and Middleton are vicariously liable for the acts of its employees and attorneys, and Farmers is vicariously liable for the acts of Dobbs and Middleton.

35. Upon information and belief, Defendant Farmers has utilized the insurance industry's Medical Information Bureau to obtain personal medical information and physicians' names concerning Plaintiffs.

36. Defendants intentionally intruded upon the solitude or seclusion of Plaintiffs' private affairs or concerns by discovering and disclosing medical information that was not relevant to the motor vehicle accident litigation.

37. Defendants' intrusion was such as would be highly offensive to a reasonable person.

38. Defendants are liable to Plaintiffs for invasion of privacy, specifically intrusion upon Plaintiffs' seclusion.

39. As a proximate result of Defendants' misconduct, Plaintiffs sustained personal injuries and/or economic damages.

40. Wherefore, Plaintiffs demand judgment for relief as set forth below in their Prayer for Relief.

IX. FIFTH CLAIM FOR RELIEF

(Private Life Invasion of Privacy)

41. The allegations contained in paragraphs 1 through 21 are incorporated in this count.

42. Defendants publicly disclosed private medical information that was not relevant to the motor vehicle accident litigation and that was not of legitimate concern to the public.

43. Defendants' disclosure of such private medical information would be highly offensive to a reasonable person.

44. Defendants are liable to Plaintiffs for invasion of privacy, specifically publicity given to private life.

45. As a proximate result of Defendants' misconduct, Plaintiffs sustained personal injuries and/or economic damages.

46. Wherefore, Plaintiffs demand judgment for relief as set forth below in their Prayer for Relief.

X. SIXTH CLAIM FOR RELIEF

(False Light Invasion of Privacy)

47. The allegations contained in paragraphs 1 through 21 are incorporated in this count.

48. Defendants publicly disclosed medical information, not relevant to the motor vehicle accident litigation, about Plaintiffs that placed Plaintiffs in a false Tight; i.e., as individuals who were or are mentally infirm and/or emotionally unstable.

49. Defendants had knowledge of or acted in reckless disregard to the falsity of the publicized matter and the false light in which Plaintiffs would be placed.

50. The false light in which Plaintiffs were placed would be highly offensive to a reasonable person.

51. As a proximate result of Defendants' misconduct, Plaintiffs sustained personal injuries and/or economic damages.

52. Defendants are liable to Plaintiffs for invasion of privacy, specifically false light invasion of privacy.

53. Wherefore, Plaintiffs demand judgment for relief as set forth below in their Prayer for Relief.

XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand a trial by jury under the Seventh Amendment to the United States Constitution and under Fed. R. Civ. P. 38 and 39, and the Plaintiffs pray that the Court.

1. Declare that the Defendants, singularly or in combination, have conspired to and/or violated the medical privilege of Plaintiffs, the Racketeer Influenced and Corrupt Organizations Act, in that they committed mail and/or wire fraud and failed in their duty to maintain the medical confidences of Plaintiffs by misrepresenting the content ofthe court order and procuring confidential records and other appropriate injunctive and equitable relief to secure a complete remedy;

2. Declare that there exists among the Defendants an agency relationship;

3. Grant the Plaintiffs damages proved at trial for the civil actions alleged, treble damages under the Racketeer Influenced and Corrupt Organizations Act, damages under Oklahoma common law and/or under the Oklahoma Code, as well as any other appropriate injunctive and equitable relief to secure an. appropriate remedy;

4. Order the Defendants to pay the Plaintiffs' reasonable attorney's fees;

5. Order the Defendants to pay court costs; and

6. Award such other relief as this Court deems just and proper to which Plaintiffs may be entitled.

LIEN CLAIMED

JURY TRIAL DEMANDED

Respectfully Submitted,

/s/ James M. Erikson
JAMES M. ERIKSON (OBA 17469)
James M. Erikson, P.C.
Attorney and Counselor at Law
P.O. Box 950638
Oklahoma City, OK 73195-0638
(405) 232-9796
(405) 447-9797 FAX

/s/ T. Leslie Barr
T. LESLIE BARR, OBA #1741
2320 Westpark Drive
Norman, Oklahoma 73069
Phone: (405) 364-1919
Fax: (405) 329-2284
E-mail: tlbarr1@earthlink.net

ATTORNEYS FOR PLAINTIFFS

EXHIBITS TO APPENDIX H

DOBBS & MIDDLETON
Attorneys at Law
Not a Partnership
100 N. Broadway, Suite 1900
Oklahoma City, OK 73102
Telephone (405) 235-7600
Facsimile: (405) 235-7636

STEVEN DOBBS
PAUL B. MIDDLETON
WILLIAM D. PETTIGREW
JOHN R. NOWAKOWSKI
RON R. MASON
WESLEY G. SMITH
ANGELA D. CHANCELLOR
RICHARD A. BRUCE

EMPLOYEES OF THE LITIGATION DEPARTMENT OF THE
FARMERS INSURANCE GROUP OF COMPANIES®

September 3, 1998

Dr. Jonathan Schwartz
Attn: Medical Records Custodian
400 S. Douglas # 313
OKC, OK 73103

Re: Patient: James M. Erikson, DOB: 6/1/43
Erickson v. Davis: Our File No. 989J00211

Dear Records Custodian:

Enclosed please find a Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray

reports, consulting reports, medical liens, all medical bills *or other information contained in the patient's chart or file.* Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report.

Also enclosed is an Affidavit of Authenticity to be completed with regard to any records that are copied and forwarded to this office. We request you sign the Affidavit, having your signature notarized, so that the need for your appearance at the trial of this matter may be avoided.

If there is a charge for copying these records, please forward your statement at the time the records are sent. We will promptly remit payment in accordance with the Oklahoma Statutes covering cost of medical records and the customary charges in this community.

We request receipt of those records no later than 9/19/98. If there is any problem regarding our request, please contact me immediately at 405-235-7600 so we may resolve those matters and obtain the records at the earliest opportunity. Thank you in advance for your assistance and cooperation in this matter.

Yours very truly,

DOBBS & MIDDLETON

/s/ Laurie J. Miller
LAURIE J. MILLER
Legal Assistant to Richard A. Bruce

tg
Enclosure

DOBBS & MIDDLETON
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RICHARD A. BRUCE

EMPLOYEES OF THE LITIGATION DEPARTMENT OF THE
FARMERS INSURANCE GROUP OF COMPANIES®

September 3, 1998

USAF Hospital Tinker AFMC
Attn: Medical Records Custodian
72 MDG/SGA
Tinker AFB, OK 73145

Re: Patient: Patrick Kilgallen, DOB: 5/23/38
Kilgallen v. Davis; Our File No. 989J00210

Dear Records Custodian:

Enclosed please find a Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills *or*

other information contained in the patient's chart or file. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report.

Also enclosed is an Affidavit of Authenticity to be completed with regard to any records that are copied and forwarded to this office. We request you sign the Affidavit, having your signature notarized, so that the need for your appearance at the trial of this matter may be avoided.

If there is a charge for copying these records, please forward your statement at the time the records are sent. We will promptly remit payment in accordance with the Oklahoma Statutes covering cost of medical records and the customary charges in this community.

We request receipt of those records no later than 9/19/98. If there is any problem regarding our request, please contact me immediately at 405-235-7600 so we may resolve those matters and obtain the records at the earliest opportunity. Thank you in advance for your assistance and cooperation in this matter.

Yours very truly,

DOBBS & MIDDLETON

/s/ Laurie J. Miller
LAURIE J. MILLER
Legal Assistant to Richard A. Bruce

tg
Enclosure

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed Sep. 1, 1998]

Case No. CJ-97-2054-BH

JAMES ERIKSON and PATRICK KILGALLEN,
Plaintiffs,

v.

DANA ELIZABETH DAVIS,
Defendant.

ORDER FOR WAIVER OF MEDICAL PRIVILEGE
OF PLAINTIFF JAMES ERIKSON

NOW on this 31st day of August, 1998, the above-styled and numbered cause of action comes before the Court on Defendants Motion for Order Waiving Medical Privilege of Plaintiff James Erikson. The Court, having reviewed Defendant's brief, with counsel for Plaintiffs failing to appear for the motion hearing or file a response, does hereby order waiver of Plaintiff James Erikson's medical privilege with the following restriction: Waiver of medical privilege only applies to headache, neck, back, shoulder, arm and blood pressure problems.

IT IS SO ORDERED

APPROVED AS TO FORM:

Judge of the District Court

/s/ Richard A. Bruce
RICHARD A. BRUCE, OBA #16950
DOBBS & MIDDLETON
100 North Broadway, Suite 1900
Oklahoma City, OK 73102
(405) 235-7600
(405) 235-7636 facsimile
ATTORNEY FOR DEFENDANT

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed Sep. 1, 1998]

Case No. CJ-97-2054-BH

JAMES ERIKSON and PATRICK KILGALLEN,
Plaintiffs,

v.

DANA ELIZABETH DAVIS,
Defendant.

ORDER FOR WAIVER OF MEDICAL PRIVILEGE
OF PLAINTIFF PATRICK KILGALLEN

NOW on this 31st day of August, 1998, the above-styled and numbered cause of action comes before the Court on Defendants Motion for Order Waiving Medical Privilege of Plaintiff Patrick Kilgallen. The Court, having reviewed Defendant's brief, with counsel for Plaintiffs failing to appear for the motion hearing or file a response, does hereby order waiver of Plaintiff Patrick Kilgallen's medical privilege with the following restriction: Waiver of medical privilege only applies to headache, neck, back, shoulder, arm and blood pressure problems.

IT IS SO ORDERED

APPROVED AS TO FORM:

Judge of the District Court

/s/ Richard A. Bruce
RICHARD A. BRUCE, OBA #16950
DOBBS & MIDDLETON
100 North Broadway, Suite 1900
Oklahoma City, OK 73102
(405) 235-7600
(405) 235-7636 facsimile
ATTORNEY FOR DEFENDANT

APPENDIX G

Aug-14-00 FROM: SC/MEDICAL RECORDS 757-259-0708
PAGE 01

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ANGELA D. CHANCELLOR
RICHARD A. BRUCE

EMPLOYEES OF THE LITIGATION DEPARTMENT OF THE
FARMERS INSURANCE GROUP OF COMPANIES®

September 3. 1998

Dr. Thomas Hoffmeyer
Attn: Medical Records Custodian
3901 Treydurn # 201
Williamsburg, VA 23185

Re: Patient: James M. Erikson, DOB: 6/1/43
Erickson v. Davis: Our File No. 989J00211

Dear Records Custodian:

Enclosed please find a Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the complete medical records (every page) including office notes,

handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills *or other information contained in the patient's chart or file.* Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report.

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Yours very truly,

DOBBS & MIDDLETON

/s/ Laurie J. Miller
LAURIE J. MILLER
Legal Assistant to Richard A. Bruce

tg
Enclosure

APPENDIX H

RELEVANT PART OF TITLE 12 O.S. § 95

OKLAHOMA STATUTES,

TITLE 12.—CIVIL PROCEDURE

CHAPTER 3.—LIMITATION OF ACTIONS

§ 95. Limitation of other actions

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

> 3. Within two (2) years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud;
>
> * * * *

TITLE 12.—CIVIL PROCEDURE

CHAPTER 39—OKLAHOMA PLEADING CODE

§ 2004.1—Subpoena

A. Subpoena; Form; Issuance.

1. Every subpoena shall:

a. state the name of the court from which it is issued and the title of the action; and

b. command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified.

2. A subpoena shall issue from the court where the action is pending, and it may be served at any place within the state. If the action is pending outside of this state, the district court for the county in which the deposition is to be taken shall issue the subpoena and, upon application, any other order or process that may be appropriate in aid of discovery in that action. Proof of service of a notice to take deposition constitutes a sufficient authorization for the issuance by the clerk of subpoenas for the persons named or described therein; provided, any person aggrieved by the issuance or enforcement of the subpoena may obtain judicial review upon the filing of a civil action and payment of the required fees.

3. A witness shall be obligated upon service of a subpoena to attend a trial or hearing at any place within the state and to attend a deposition or produce or allow inspection of documents at a location that is authorized by subsection B of Section 3230 of this title.

4. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. As an officer of the court, an attorney authorized to practice law in this state may also issue and sign a subpoena on behalf of a court of this state.

5. Leave of court for issuance of a subpoena for the production of documentary evidence shall be required if the plaintiff seeks to serve a subpoena for the production of documentary evidence on any person who is not a party prior to the expiration of thirty (30) days after service of the summons and petition upon any defendant.

6. Notwithstanding any other provision of law, a court clerk of this state shall not be subject to a subpoena in matters relating to court records unless the court makes a specific finding that the appearance and testimony of the court clerk are both material and necessary because of a written objection to the introduction of the court records made by a party prior to trial.

B. SERVICE.

1. Service of a subpoena upon a person named therein shall be made by delivering or mailing a copy thereof to such person and, if the person's attendance is demanded, by tendering to that person the fees for one (1) day's attendance and the mileage allowed by law. Service of a subpoena may be accomplished by any person who is eighteen (18) years of age or older. A copy of any subpoena that commands production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by subsection B of Section 2005 of this title. If the subpoena commands production of documents and things or inspection of premises from a nonparty before trial but does not require attendance of a witness, the subpoena shall specify a date for the production or inspection that is at least seven (7) days

after the date that the subpoena and copies of the subpoena are served on the witness and all parties, and the subpoena shall include the following language: "In order to allow objections to the production of documents and things to be filed, you should not produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection."

2. Service of a subpoena by mail may be accomplished by mailing a copy thereof by certified mail with return receipt requested and delivery restricted to the person named in the subpoena. The person serving the subpoena shall make proof of service thereof to the court promptly and, in any event, before the witness is required to testify at the hearing or trial. If service is made by a person other than a sheriff or deputy sheriff, such person shall make affidavit thereof. If service is by mail, the person serving the subpoena shall show in the proof of service the date and place of mailing and attach a copy of the return receipt showing that the mailing was accepted. Failure to make proof of service does not affect the validity of the service, but service of a subpoena by mail shall not be effective if the mailing was not accepted by the person named in the subpoena. Costs of service shall be allowed whether service is made by the sheriff, the sheriff's deputy, or any other person. When the subpoena is issued on behalf of a state department, board, commission, or legislative committee, fees and mileage shall be paid to the witness at the conclusion of the testimony out of funds appropriated to the state department, board, commission, or legislative committee.

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or

attorney, or both, in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection and copying or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection or copying of any or all of the designated materials or of the premises. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a

party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(1) fails to allow reasonable time for compliance; or

(2) requires a person to travel to a place beyond the limits allowed under paragraph 3 of subsection A of this section; or

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(4) subjects a person to undue burden; or

(5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

b. If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information; or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. DUTIES IN RESPONDING TO SUBPOENA.

1. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

2. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.

TITLE 12.—CIVIL PROCEDURE

CHAPTER 41—DISCOVERY CODE

§ 3226 - General Provisions Governing Discovery

A. DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under this section, the frequency of use of these methods is not limited.

B. DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with the Oklahoma Discovery Code, the scope of discovery is as follows:

1. IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party shall produce upon request pursuant to Section 3234 of this title, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of

this section, an application for insurance shall not be treated as a part of an insurance agreement.

2. TRIAL PREPARATION: MATERIALS. Subject to the provisions of paragraph 3 of this subsection, discovery may be obtained of documents and tangible things otherwise discoverable under paragraph 1 of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for the representative of that other party, including his attorney, consultant, surety, indemnitor, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing provided for in this paragraph, a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of paragraph 4 of subsection A of Section 3237 of this title apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

a. A written statement signed or otherwise adopted or approved by the person making it, or

b. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which substantially recites

an oral statement by the person making it and contemporaneously recorded.

3. TRIAL PREPARATION: EXPERTS.

a. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph 1 of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) A party may, through interrogatories, require any other party to identify each person whom that other party expects to call as an expert witness at trial and give the address at which that expert witness may be located.

(2) After disclosure of the names and addresses of the expert witnesses, the other party expects to call as witnesses, the party, who has requested disclosure, may depose any such expert witnesses subject to scope of this section. Prior to taking the deposition the party must give notice as required in subsections A and C of Section 3230 of this title. If any documents are provided to such disclosed expert witnesses, the documents shall not be protected from disclosure by privilege or work product protection and they may be obtained through discovery.

(3) In addition to taking the depositions of expert witnesses the party may, through interrogatories, require the party who expects to call the expert witnesses to state the subject matter on which each expert witness is expected to testify; the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion; the qualifications of each expert witness, including a list of all publications authored by the expert witness within the preceding ten (10) years; the compensation to be paid to the expert witness for the testimony and preparation for the testimony; and a listing of any other cases in which the expert witness has testified as an expert at trial

or by deposition within the preceding four (4) years. An interrogatory seeking the information specified above shall be treated as a single interrogatory for purposes of the limitation on the number of interrogatories in Section 3233 of this title.

b. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon motion, when the court may order discovery as provided in Section 3235 of this title or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by any other means.

c. Unless manifest injustice would result:

(1) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under division (2) of subparagraph a of this paragraph and subparagraph b of this paragraph.

(2) The court shall require that the party seeking discovery with respect to discovery obtained under subparagraph b of this paragraph, pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

4. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. When a party withholds information otherwise discoverable under the Oklahoma Discovery Code by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

C. PROTECTIVE ORDERS.

1. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer, either in person or by telephone, with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or on matters relating to a deposition, the district court in the county where the deposition is to be taken may enter any order which justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense, including one or more of the following:

a. that the discovery not be had,

b. that the discovery may be had only on specified terms and conditions, including a designation of the time or place,

c. that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery,

d. that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters,

e. that discovery be conducted with no one present except persons designated by the court,

f. that a deposition after being sealed be opened only by order of the court,

g. that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way, and

h. that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

2. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of paragraph 4 of subsection A of Section 3237 of this title apply to the award of expenses incurred in relation to the motion. Any protective order of the court which has the effect of removing any material obtained by discovery from the public record shall contain the following:

a. a statement that the court has determined it is necessary in the interests of justice to remove the material from the public record,

b. specific identification of the material which is to be removed or withdrawn from the public record, or which is to be filed but not placed in the public record, and

c. a requirement that any party obtaining a protective order place the protected material in a sealed manila envelope clearly marked with the caption and case number and is clearly marked with the word "CONFIDENTIAL", and stating the date the order was entered and the name of the judge entering the order;

3. No protective order entered after the filing and microfilming of documents of any kind shall be construed to require the microfilm record of such filing to be amended in any fashion;

4. The party or counsel which has received the protective order shall be responsible for promptly presenting the order to appropriate court clerk personnel for appropriate action;

5. All documents produced or testimony given under a protective order shall be retained in the office of counsel until required by the court to be filed in the case;

6. Counsel for the respective parties shall be responsible for informing witnesses, as necessary, of the contents of the protective order; and

7. When a case is filed in which a party intends to seek a protective order removing material from the public record, the plaintiff(s) and defendant(s) shall be initially designated on the petition under pseudonym such as "John or Jane Doe", or "Roe", and the petition shall clearly indicate that the party designations are fictitious. The party seeking confidentiality or other order removing the case, in whole or in part, from the public record, shall immediately present application to the court, seeking instructions for the conduct of the case, including confidentiality of the records.

D. SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence. The fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay discovery by any other party.

E. SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when it was made is under no duty to supplement the response to include information thereafter acquired, except as follows:

1. A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:

a. the identity and location of persons having knowledge of discoverable matters, and

b. the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony of the person.

2. A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party obtains information upon the basis of which:

a. (i) the party knows that the response was incorrect in some material respect when made, or

(ii) the party knows that the response, which was correct when made, is no longer true in some material respect; and

b. the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

3. A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

F. DISCOVERY CONFERENCE. At any time after commencement of an action, the court may direct the attorneys for the parties to appear for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

1. A statement of the issues as they then appear;

2. A proposed plan and schedule of discovery;

3. Any limitations proposed to be placed on discovery;

4. Any other proposed orders with respect to discovery; and

5. A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten (10) days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. In preparing the plan for discovery the court shall protect the parties from excessive or abusive use of discovery. An order shall be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference.

G. SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS. Every request for discovery, response or objection thereto made by a party represented by an attorney shall be signed by at least one of his attorneys of record in his individual name whose address shall be stated. A party who is not represented by an attorney shall sign the request, response or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response or objection, and that it is:

1. To the best of his knowledge, information and belief formed after a reasonable inquiry consistent with the Okla-

homa Discovery Code and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law;

2. Interposed in good faith and not primarily to cause delay or for any other improper purpose; and

3. Not unreasonable or unduly burdensome or expensive, given the nature and complexity of the case, the discovery already had in the case, the amount in controversy, and other values at stake in the litigation. If a request, response or objection is not signed, it shall be deemed ineffective.

If a certification is made in violation of the provisions of this subsection, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response or objection is made, or both, an appropriate sanction, which may include an order to pay to the amount of the reasonable expenses occasioned thereby, including a reasonable attorney fee.

TITLE 43A.—MENTAL HEALTH

CHAPTER 1

§ 1-109—Privileged, Confidential Nature of Medical Records and Communications Between Physician or Psychotherapist and Patient

A. 1. All mental health and drug or alcohol abuse treatment information, whether or not recorded, and all communications between a physician or psychotherapist and a consumer are both privileged and confidential. In addition, the identity of all persons who have received or are receiving mental health or drug or alcohol abuse treatment services shall be considered confidential and privileged.

2. Such information shall only be available to persons actively engaged in the treatment of the consumer or in related administrative work. The information available to persons actively engaged in the treatment of the consumer or in related administrative work shall be limited to the minimum amount of information necessary for the person or agency to carry out its function.

3. Except as otherwise provided in this section, such information shall not be disclosed to anyone not involved in the treatment of the patient or related administrative work.

B. A person who is or has been a consumer of a physician, psychotherapist, mental health facility, a drug or alcohol abuse treatment facility or service, other agency for the purpose of mental health or drug or alcohol abuse care and treatment shall be entitled to personal access to his or her mental health or drug or alcohol abuse treatment information, except the following:

1. Information contained in notes recorded in any medium by a mental health professional documenting or analyzing the contents of conversation during a private counseling

session or a group, joint or family counseling session, and that is separated from the rest of the patient's medical record;

2. Information compiled in reasonable anticipation of or for use in a civil, criminal or administrative action or proceeding;

3. Information that is otherwise privileged or prohibited from disclosure by law;

4. Information the person in charge of the care and treatment of the patient determines to be reasonably likely to endanger the life or physical safety of the patient or another person;

5. Information created or obtained as part of research that includes treatment; provided, the patient consented to the temporary suspension of access while the research is ongoing. The patient's right of access shall resume upon completion of the research;

6. Information requested by an inmate that a correctional institution has determined may jeopardize the health, safety, security, custody or rehabilitation of the inmate or other person; and

7. Information obtained under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information.

C. 1. A valid written release for disclosure of mental health or drug or alcohol abuse treatment information shall have, at a minimum, the following elements:

a. the specific name or general designation of the program or person permitted to make the disclosure,

b. the name or title of the individual or the name of the organization to which disclosure is to be made,

c. the name of the consumer whose records are to be released,

d. the purpose of the disclosure,

e. a description of the information to be disclosed,

f. the dated signature of the consumer or authorized representative or both when required,

g. a statement of the right of the consumer to revoke the release in writing and a description of how the consumer may do so,

h. an expiration date, event or condition which, if not revoked before, shall ensure the release will last no longer than reasonably necessary to serve the purpose for which it is given, and

i. if the release is signed by a person authorized to act for a consumer, a description of the authority of such person to act.

2. A release is not valid if the document submitted has any of the following defects:

a. the expiration date has passed or the expiration event or condition is known to have occurred or to exist,

b. the release has not been filled out completely with respect to an element described in paragraph 1 of this section,

c. the release is known to have been revoked, or

d. any material information in the release is known to be false.

3. A revocation of a release as provided in this section shall be in writing and may be made at any time, except when:

a. information has already been released in reliance thereon,

b. the authorization was obtained as a condition of obtaining insurance coverage and other law provides the in-

surer with the right to contest a claim under the policy or the policy itself, or

c. the release was executed as part of a criminal justice referral.

4. Disclosure regarding a deceased consumer shall require either a court order or a written release of an executor, administrator or personal representative appointed by the court, or if there is no such appointment, by the spouse of the consumer or, if none, by any responsible member of the family of the consumer. As used in this paragraph, "responsible family member" means the parent, adult child, adult sibling or other adult relative who was actively involved in providing care to or monitoring the care of the patient as verified by the physician, psychologist or other person responsible for the care and treatment of such person.

D. Except as otherwise permitted, mental health and alcohol or substance abuse treatment information may not be disclosed without valid patient authorization or a valid court order issued by a court of competent jurisdiction. For purposes of this section, a subpoena by itself is not sufficient to authorize disclosure of mental health and alcohol or substance abuse treatment information.

E. An authorization shall not be required for the following uses and disclosures:

1. Disclosure by a health care provider of mental health information necessary to carry out such provider's own treatment, payment, or health care operations;

2. Communications to law enforcement officers regarding information directly related to the commission of a crime on the premises of a facility or against facility personnel, or a threat to commit such a crime. Such communications involving persons with substance abuse disorders shall be limited to the circumstances surrounding the incident, consumer status,

name and address of that individual and the last-known whereabouts of that individual;

3. A review preparatory to research, research on decedents information or research conducted when a waiver of authorization has been approved by either an institutional review board or privacy board;

4. Communications pursuant to a business associate agreement, qualified service organization agreement or a qualified service organization/business associate agreement. As used in this paragraph:

a. "business associate agreement" means a written signed agreement between a health care provider and an outside entity which performs or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information on behalf of the health care provider,

b. "qualified service organization agreement" means a written, signed agreement between a health care provider and an outside entity which provides services to the health care provider's consumers that are different from the services provided by the health care provider, that allows the health care provider to communicate consumer information necessary for the outside entity to provide services to the health care provider's consumers without the need for an authorization signed by a consumer and in which the outside entity acknowledges that in receiving, storing, processing or otherwise dealing with any consumer information from the health care provider it is fully bound by the provisions of 42 C.F.R., Part 2 and, if necessary, will resist any efforts in judicial proceedings to obtain access to consumer information, except as permitted by 42 C.F.R., Part 2, and

c. "qualified service organization/business agreement" means a written, signed agreement between a health care provider and an outside entity which provides services to the

health care provider's consumers that are different from the services provided by the health care provider, that allows the health care provider to communicate consumer information necessary for the outside entity to provide services to the health care provider's consumers without the need for an authorization signed by a consumer, and in which the outside entity acknowledges that in receiving, storing, processing or otherwise dealing with any consumer information from the health care provider it is fully bound by the provisions 42 C.F.R., Part 2 and, if necessary, will resist any efforts in judicial proceedings to obtain access to consumer information, except as permitted by 42 C.F.R., Part 2. The agreement must also contain elements required by federal privacy regulations in 45 C.F.R., Parts 160 & 164;

5. Reporting under state law incidents of suspected child abuse or neglect to the appropriate authorities; provided, however, for disclosures involving an individual with a substance abuse disorder, this exception does not allow for follow-up communications;

6. Disclosure of consumer-identifying information to medical personnel who have a need for information about a consumer for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention;

7. Communications necessary for audit and evaluation activities;

8. When a program or facility director determines that an adult person with a substance abuse disorder has a medical condition which prevents the person from "knowing or effective action on his or her own behalf", the program or facility director may authorize disclosures for the sole purpose of obtaining payment for services. If the person has been adjudicated incompetent, the facility must seek permission to disclose information for payment from the legal guardian;

9. Reporting of such information as otherwise required by law; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder;

10. Communications to coroners, medical examiners and funeral directors for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law and as necessary to carry out their duties; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder;

11. Communications to organ procurement organizations or other entities engaged in procurement, banking, or transplantation of cadaveric organs, eyes or tissue for the purpose of facilitating organ, eye or tissue donation and transplantation; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder;

12. Disclosure to professional licensure boards investigating alleged unethical behavior towards a patient; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder;

13. Disclosure to the parent of a minor for the purpose of notifying the parent of the location of his or her child; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder;

14. Mental health records may be disclosed to parties in a judicial or administrative proceeding in cases involving a claim for personal injury or death against any practitioner of the healing arts, a licensed hospital, or a nursing facility or nursing home licensed pursuant to Section 1-1903 of Title 63 of the Oklahoma Statutes arising out of patient care, where any person has placed the physical or mental condition of that

person in issue by the commencement of any action, proceeding, or suit for damages, or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom the person rightfully claims;

15. Disclosure of consumer-identifying information when it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody and the release is to a law enforcement authority for the purpose of identification and apprehension; and

16. When failure to disclose the information presents a serious threat to the health and safety of a person or the public; provided, however, such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder.

APPENDIX I

RELEVANT PARTS OF TITLE 18 USCS § 1341

UNITED STATES CODE SERVICE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

PART I.—CRIMES

CHAPTER 63.—MAIL FRAUD

18 USCS § 1341 (2004)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

RELEVANT PART OF TITLE 18 USCS § 1343

UNITED STATES CODE SERVICE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

PART I.—CRIMES

CHAPTER 63.—MALL FRAUD

18 USCS § 1343 (2004)

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

RELEVANT PART OF TITLE 18 USCS § 1961

UNITED STATES CODE SERVICE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

PART I.—CRIMES

CHAPTER 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter [18 USCS § § 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USCS § 802D, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections

1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice [influencing or injuring officer or juror generally]), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons)[.], section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain

motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [8 USCS § 1324] (relating to bringing in and harboring certain aliens), section 277 [8 USCS § 1327] (relating to aiding or assisting certain aliens to enter the United States), or section 278 [8 USCS § 1328] (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * *

(9) "documentary material" includes any book, paper, document, record, recording, or other material;

* * * *

RELEVANT PART OF TITLE 18 USCS § 1964

UNITED STATES CODE SERVICE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

PART I.—CRIMES

CHAPTER 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1964 (2004)

§ 1964. Civil remedies (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against

any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(2)

No. 05-1454

Supreme Court, U.S.
FILED
JUN 14 2006
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In The
Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,

Petitioners,

v.

FARMERS GROUP, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT OF FARMERS GROUP, INC.

Pursuant to SUP. CT. R. 29.6, Farmers Group, Inc. states that its parent company is Zurich Financial Services, whose stock is traded on the London and Zurich Stock Exchanges.

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PRELIMINARY STATEMENT

Petitioners' Petition for a Writ of Certiorari argues their continuing disagreement with the application of settled rules of law by the United States District Court for the Western District of Oklahoma (the "District Court") and the affirmance of that application of settled rules of law by the United States Circuit Court of Appeals for the Tenth Circuit (the "Circuit Court").

Below, Petitioners asserted claims against Respondents for what Petitioners called: (1) misrepresentation; (2) invasion by intrusion; (3) private life invasion of privacy; (4) false light invasion of privacy; and (5) RICO. The alleged conduct giving rise to these five claims was the mailing of a single letter to 46 of Petitioners' health-care providers seeking production of medical records during discovery in an earlier car wreck case brought by Petitioners against an insured of Respondent Farmers to whom Farmers provided a defense. Although the letter enclosed a Court Order waiving medical privilege for conditions relevant to the car wreck suit, the premise of Petitioners' asserted claims was that the language of the letter requested a broader scope of records than authorized by the language of the Order itself.

The District Court granted Respondents' motion to dismiss under Fed. R. Civ. P. 12(b)6. The Circuit Court – in an unpublished opinion – affirmed and rehearing *en banc* was denied. The affirmance was based on the application of established and quite uncontroversial rules of law to the particular circumstance of this case; namely, that the Petitioners' state law claims were subject to a two-year statute of limitations and that the RICO claim required an allegation of a pattern of racketeering activity.

The "Questions Presented" by Petitioners make plain that this is a party-specific case of no significance to anybody but the parties to it. First, there is no question that both the District Court and the Circuit Court correctly stated the law requiring the court to take all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving party and stated that they did so. (Circuit Court Order and Judgment, Appendix C, p. 7a; District Court Order, Appendix D, p. 15a.)[1] Petitioners' argument is simply that the District Court (when dismissing) and Circuit Court (when affirming) misapplied that correctly stated rule of law. Second, there is no question that both courts applied the correct two-year statute of limitations to the Oklahoma tort claims, although Petitioners argue the commencement date under the particular facts. Third, there is no question that both courts properly ruled that RICO requires a pattern of racketeering activity. Petitioners, in an untimely argument, simply contend that their pleadings should be construed as alleging one. This is not a case worthy of certiorari review.

Plaintiffs lost at the District Court. They had their appeal to the Circuit Court. They lost at the Circuit Court, and applied to the Circuit Court for rehearing *en banc*. Their Petition for Rehearing was denied. The Petition for Writ of Certiorari presents no persuasive reason for this Court to grant review.

[1] References herein to the "Appendix" are to the Appendix to Petitioners' Petition for Writ of Certiorari.

OPINIONS BELOW

Respondents' 12(b)(6) motion to dismiss the state law tort claims argued that those claims were barred by the statute of limitations. The supposedly wrongful conduct took place almost four years before this lawsuit was filed and the supposed injury occurred more than two years before this lawsuit. There is no dispute that Oklahoma applies a two-year limitation period to such claims.

The District Court granted Respondents' Motion to Dismiss, concluding:

> The allegations of the Second Amended Complaint thus demonstrate that "at trial," *i.e.*, no later than June 28, 2000, plaintiffs knew or had reason to know of the injury which is the basis for their claims of misrepresentation, invasion of privacy by intrusion, private life invasion of privacy, and false light invasion of privacy. In accepting the facts alleged in the Second Amended Complaint as true, it is clear that plaintiffs knew or should have known, no later than June 28, 2000, that defendant had obtained medical records from their health-care providers which exceeded the scope of the court's Order for Waiver of Medical Privilege. Plaintiffs knew at the time of trial that they had not provided the records to defendant. Plaintiffs' alleged injury occurred "at trial". Therefore, plaintiffs' original complaint in this lawsuit, filed August 14, 2002, more than two years after the June 26 through June 28, 2000 state court trial, was untimely and plaintiffs' tort claims are barred by the applicable statute of limitations. 12 O.S. § 95 (two year statute of limitations applies to action for injury to the rights of another, not arising on contract).

> In light of this determination, the court need not and does not consider the merits, if any, of plaintiffs' tort claims. Nor is the court required to address the other arguments submitted by defendant in support of dismissal of the tort claims. However, were the court to consider the other arguments, the court determines that dismissal of the tort claims would be warranted on the other grounds raised by defendant in the Motion to Dismiss.

(District Court Order, Appendix D, p. 22a.)

The District Court also dismissed Petitioners' RICO claim as follows:

> The allegations of the Second Amended Complaint, even if true, are insufficient as a matter of law to support a RICO claim and fail to satisfy the required RICO pattern of racketeering activity.

(District Court Order, Appendix D, p. 24a.)

Petitioners appealed the judgment of the District Court to the Circuit Court. In their briefing to the Circuit Court, however, Petitioners argued only that: (1) the dismissal of their tort claims based on the statute of limitations was erroneous because they learned the precise nature of the wrongful conduct within the two-year period; (2) dismissal of the RICO claim was erroneous because the sending of the one letter to multiple recipients in the car wreck lawsuit was a sufficient showing of a pattern; (3) they should have been given leave to amend their already twice amended Complaint despite their failure to ask for leave to do so; and (4) granting Respondents' motion to dismiss prior to Petitioners conducting

any discovery was premature, despite the fact that Petitioners did not attempt to initiate any discovery.

The Circuit Court affirmed the District Court's dismissal of the state law tort claims as follows:

> Applying Oklahoma's two-year statute of limitations for invasion of privacy and misrepresentation, the statute of limitations expired no later than June 28, 2002. Plaintiffs did not file this lawsuit until August 14, 2002. Therefore, the district court properly held that Plaintiffs' misrepresentation and invasion of privacy claims are barred by the statute of limitations. Because Plaintiffs' state law claims are barred by the statute of limitations, we do not consider Farmers' other defenses.

(Circuit Court Order and Judgment, Appendix C, pp. 10a-11a.)

The Circuit Court affirmed the dismissal of RICO claims as follows:

> Plaintiffs have not alleged the type of long-term criminal activity against which the RICO statute is aimed. *See H.J. Inc.*, 492 U.S. at 242. Accordingly, the district court's dismissal of the RICO claim was not in error.

(Circuit Court Order and Judgment, Appendix C, pp. 12a-13a.)

Petitioners moved the Circuit Court for rehearing *en banc*, which was denied. (Circuit Court Order, Appendix B, p. 3a.)

The Order of the District Court and the Order and Judgment of the Circuit Court were unpublished.

SUMMARY OF REASONS TO DENY CERTIORARI

The first reason the Petition for Writ of Certiorari should be denied is that the District Court (when considering Respondents' Motion to Dismiss) and the Circuit Court (when reviewing the District Court's dismissal) properly stated the law. Both courts recognized their obligation to take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. The District Court and Circuit Court both stated that they did in fact take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. Both applied the correct Oklahoma statute of limitations in dismissing the state law claims. Both applied settled principles of federal law in dismissing the RICO claim. Thus, the "Questions Presented" by Petitioners are, at most, claimed misapplications of properly stated rules of law. Even if Petitioners were correct, the Petition would not be worthy of certiorari review. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing").

The second reason the Petition for Certiorari should be denied is that the Petition does not invoke any legitimate reason for certiorari review as set forth in Supreme Court Rule 10. Instead, the basis of the Petition is simply that Petitioners disagree with the conclusions of the District Court and the unanimous unpublished decision of the Circuit Court which considered Petitioners' appeal. As will be shown below, however, the District Court was correct – on the merits – in its dismissal of Petitioners' Second Amended Complaint. The Circuit Court panel which considered Petitioners' appeal was correct – on the

merits – when it affirmed that dismissal. The Circuit Court *en banc* was correct to deny rehearing.

STATEMENT OF THE CASE[2]

In 1997, Petitioners filed a lawsuit against an insured of Farmers for alleged soft-tissue injuries and broken eyeglasses sustained in a car accident. The style of the car accident case was *Erikson and Kilgallen v. Davis*, Case No. CJ-97-2054-BH, District Court of Cleveland County, Oklahoma (hereinafter "*Davis*"). (District Court Order, Appendix D, p. 16a; Docket, Appendix E, p. 26a.) During discovery in *Davis*, the District Court of Cleveland County Oklahoma issued an Order For Waiver Of Medical Privilege, "Order[ing] waiver of Plaintiff[s'] . . . medical privilege with the following restriction: waiver of medical privilege only applies to headache, neck, back, shoulder, arm and blood pressure problems." (District Court Order, Appendix D, pp. 16a-17a, ¶¶ 10, 11.) Thereafter, a legal assistant at Dobbs & Middleton (the law firm representing the defendant in Petitioners' car wreck case and alleged to be employees of Farmers) sent a letter to 46 medical service providers who had treated or examined Petitioners before or after the automobile accident. (*Id.*, pp. 18a-19a,

[2] What controlled the District Court's decision below was what was alleged in the Second Amended Complaint, undisputed documents which aided the District Court by supplementing a factually inadequate complaint and matters of public record. (District Court Order, Appendix D, p. 16a.) Much of what Petitioners contend in their Statement of the Case cannot be found in the record below. Their attempt to cure the insufficiency of their Second Amended Complaint by unsupported allegations in a Petition for a Writ of Certiorari to the United States Supreme Court confirms the Second Amended Complaint's inadequacy.

¶¶ 14-16; Second Amended Complaint, Appendix F, pp. 61a-62a, ¶ 16.) The letter provided:

> Enclosed please find a [sic] Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the **complete medical records** (every page) including office notes, handwritten notes, **initial intake questionnaire**, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills ***or other information contained in the patient's chart or file***. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report.

(Emphasis in original.) (District Court Order, Appendix D, p. 19a, ¶ 14.)

According to Petitioners, even though the letter enclosed the Order of Waiver, it misdescribed the scope of records to be produced and resulted in the production and subsequent use at trial in *Davis* of information which Petitioners contend was beyond the scope of the Cleveland County District Court's Order. The sending of that one letter to multiple recipients was the sole occurrence of allegedly tortious conduct supporting Petitioners' state law claims and the sole alleged predicate act supporting their RICO claim.

The record demonstrated that Petitioners were aware that the defendant in *Davis* had obtained their medical records before January 20, 2000, more than 2½ years prior to the filing of the lawsuit. The use of those records at trial

occurred June 26 and 27, 2000, two years and six weeks before suit was filed. Applying settled Oklahoma precedent, the Court held that the case was barred by limitations.

The Order and Judgment of the Circuit Court summarizes the salient events as follows:

> On January 20, 2000, Plaintiffs filed a motion *in limine* in the state court proceedings to exclude any reference to their pre-existing medical conditions or disabilities. In the motion, Plaintiffs argued that Farmers provided the Plaintiffs with an extensive and voluminous collection of Plaintiffs' pre-existing medical conditions, constituting approximately 2,000 pages of records. Plaintiffs sought to exclude the medical records because Farmers obtained the records without providing Plaintiffs with a copy of the subpoena as required under Oklahoma law. Although the record is not entirely clear, this motion was apparently denied.
>
> Plaintiffs allege that at trial, on June 26, and 27, 2000, Farmers introduced confidential medical records that were outside the scope of the partial medical privilege waiver. Specifically, they allege that at trial Farmers made known to the court, jurors, and general public confidential medical information relating to injuries suffered in a taxicab accident in the 1940s, that one of them was prescribed Prozac, and that one of them had been previously prescribed massage therapy. Plaintiffs claim that these medical records were not relevant to the personal injury claim, and that they were unduly embarrassed, surprised and taken aback when this evidence was introduced at trial. The jury returned a verdict in favor of Ms. Davis-Lauderdale on June 28, 2000.

> Later, on August 14, 2000, Plaintiffs received a copy of the letter sent by Farmers to Dr. Thomas Hoffmeyer, one of Mr. Erikson's medical providers. Plaintiffs then subpoenaed Farmers for copies of all letters sent to Mr. Erikson's and Mr. Kilgallen's medical providers, and Farmers produced copies of all letters. On September 26, 2000, Plaintiffs moved in the District Court of Cleveland County for a judgment notwithstanding the verdict, based in part on their assertion that Farmers wrongfully obtained the medical records that were used against Mr. Erikson and Mr. Kilgallen at trial. After the trial court denied the motion, Plaintiffs appealed to the Oklahoma Court of Civil Appeals, which affirmed.

(Circuit Court Order and Judgment, Appendix C, pp. 6a-7a.)

Petitioners filed this lawsuit on August 14, 2002 (Circuit Court Order and Judgment, Appendix C, p. 5a). Two amendments later, Respondents were first served with Petitioners' Second Amended Complaint, asserting that liability can be based on an allegation that the letter seeking discovery in *Davis* overstated the scope of the Cleveland County District Court's order.

ARGUMENT

I. The United States District Court For The Western District Of Oklahoma And The United States Court Of Appeals For The Tenth Circuit Both Properly Stated The Applicable Rule of Law

In considering Respondents' arguments based on Oklahoma's statute of limitations, and in considering the fundamental flaw in Petitioners' RICO claim, the District

Court and the Circuit Court both correctly stated the applicable substantive and procedural legal principles. Both recognized their obligation to take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. The "Questions Presented" by Petitioners are – at most – issues of whether the District Court and Circuit Court misapplied a properly stated rule of law. Petitioners point to nothing in their Petition for Writ of Certiorari to make this case one of the rare exceptions to Supreme Court Rule 10 worthy of certiorari review. For this reason alone, the Petition for Writ of Certiorari should be denied.

II. On The Merits, The District Court And Circuit Court Of Appeals Properly Applied The Applicable Rule Of Law

A. Petitioners' Tort Claims Were Properly Dismissed[3]

Title 12 O.S. § 95 – Limitation of Actions – provides for a two-year statute of limitations for "an action for injury to the rights of another, not arising on contract." The trial in *Davis* was the event at which Petitioners claim that "Defendant made known to the court, the jurors and general public in attendance confidential medical information."

[3] Although the District Court relied primarily on Oklahoma's two-year statute of limitations to dismiss Petitioners' state law tort claims, it additionally concluded that were it to address the other arguments submitted by Respondents, dismissal would be warranted on those grounds as well (District Court Order, Appendix D, p. 22a.). Because the Circuit Court concluded that the District Court was correct in its application of the bar of the statute of limitations, it did not address the other grounds asserted by Respondents. (Circuit Court Order and Judgment, Appendix C, p. 11a.)

(Second Amended Complaint, Appendix F, pp. 59a-60a, ¶ 12.) The jury trial in *Davis* concluded on June 27, 2000, and the jury returned its verdict on June 28, 2000. Petitioners' original complaint in this lawsuit was filed August 14, 2002. The two-year statute of limitations provided by 12 O.S. § 95 bars Petitioners' claims. Petitioners' only argument that their tort claims are not barred is their allegation that they did not know how counsel for Ms. Davis acquired the allegedly privileged evidence. This argument fails for three reasons. First, as the Circuit Court correctly held under Oklahoma law, a plaintiff need not conclusively know of the claimed cause of an injury before a statute of limitations is triggered, only that he has allegedly been injured. *Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212, 1218 (10th Cir. 2000); *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993); *see, also Samuel Roberts Noble Foundation, Inc. v. Vick*, 1992 OK 140, ¶ 31, 840 P.2d 619, 626 (statute of limitations bars claim):

> [T]he Foundation urges that because the exact source of the problem was unknown until the independent report was completed, the limitations period did not begin until then. We disagree. It is uncontroverted that the defects in the building began to appear almost immediately. Even though there was some uncertainty as to the reasons for the problem, the observation of doors sticking and tiles popping off alerted the Foundation that a problem existed.

Daugherty v. Farmers Coop. Ass'n, 1984 OK 72, ¶ 12, 689 P.2d 947, 950-51:

> Properly limited, a discovery rule should encompass the precept that acquisition of sufficient information which, if pursued, would lead to the

> true condition of things will be held as sufficient knowledge to start the running of the statute of limitations.

Here, Petitioners knew no later than January 20, 2000, that counsel for Ms. Davis had acquired documents from sources other than Petitioners. The injury of which Petitioners complain occurred no later than at the trial on June 26 and 27, 2000, when the allegedly privileged material was introduced as evidence. Plainly, the jury's verdict in *Davis* on June 28, 2000, was the latest event triggering the statute of limitations. Both the District Court and Circuit Court were correct concluding that Petitioners' lawsuit – filed August 14, 2002 – is too late.

Next, Petitioners' argument to avoid the bar of the statute of limitations was belied by the record below. When they filed their motion *in limine* in *Davis* on January 20, 2000, Petitioners represented to the District Court of Cleveland County that on December 3, 1999, they knew that counsel for Farmers had – during the course of discovery in *Davis* – obtained information from sources other than Petitioners, including what Petitioners called "an extensive and voluminous collection of Plaintiffs' pre-existing medical conditions consisting of approximately two thousand (2000) pages of records." (Circuit Court Order and Judgment, Appendix C, p. 6a.) Petitioner Erickson – a lawyer himself – knew that Ms. Davis' counsel had what Petitioners claim they should not have had produced to them by at least that date, six months before trial in the *Davis* lawsuit, and well over two years before the Complaint below was filed. For this reason as well, Petitioners' attempt to avoid the bar of the statute of limitations fails.

And finally, there is no allegation in the Second Amended Complaint that Respondents concealed the legal assistant's mailing of the letter which resulted in the production of the allegedly confidential information. While any such allegation would have been legally inconsequential and factually inaccurate in light of Petitioners' state court arguments to the contrary, the truth is that no such argument was ever presented to the District Court.

What Petitioners did plead was that the event at which they were "unduly embarrassed, surprised and taken aback . . . and thereby defamed" was the trial of *Davis*, which concluded on June 27, 2000, more than two years before this lawsuit was filed. That they claim now that they did not know the cause of their injury (despite the ample evidence in the state court proceedings to the contrary) does not allow them to avoid the bar of 12 O.S. § 95.

The District Court correctly concluded that Petitioners' tort claims were time-barred and the Circuit Court correctly affirmed the District Court.

B. Petitioners' RICO Claim Was properly Dismissed By The District Court. The Circuit Court's Affirmance Was Correct

Petitioners' Second Amended Complaint contained a RICO claim which was also dismissed by the District Court. That dismissal was affirmed by the Circuit Court.

A complaint asserting a RICO claim must allege: (1) conduct; (2) of an enterprise; (3) through a pattern; and (4) of a racketeering activity. After taking all well-pleaded allegations in the Second Amended Complaint as true and

construing them in the light most favorable to Petitioners, the Circuit Court addressed the flaw in Petitioners' RICO claim as follows:

> Nor have Plaintiffs alleged that Farmers consistently engages in this pattern of misrepresentation and mail fraud in its regular course of business, such that future claimants in Plaintiffs' situation will suffer the same injury.

(Circuit Court Order and Judgment, Appendix C, p. 12a.)

The Circuit Court further stated:

> Plaintiffs' allegation amounts to no more than a claim that Farmers engaged in a single scheme to obtain medical information about them before the Oklahoma trial from a large number of sources. Plaintiffs cannot demonstrate closed-ended continuity because the predicate acts of mailing the letters occurred exclusively during discovery – a period not exceeding a few months.

(Circuit Court Order and Judgment, Appendix C, p. 12a.)

In their Petition for Writ of Certiorari, however, Petitioners claim that the Circuit Court was wrong because Paragraph 1 of the Second Amended Complaint is an allegation "that anyone who makes a claim against Farmers was included." A fair reading of Paragraph 1 of the Second Amended Complaint does not support the leap that Petitioners argue. The word "claimants" in context is more easily read as a shorthand reference to Mr. Kilgallen and Mr. Erikson than as an allegation that other individuals were subjected to similar treatment. Even if Plaintiffs had intended Paragraph 1 to allege fraud against an unspecified group of victims, a bare legal conclusion unsupported by any factual allegation is hardly a well-pleaded

allegation of mail fraud as a predicate to RICO liability, particularly in light of the requirement to plead with particularity. *See Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (RICO acts must be plead in conformity with the particularity requirement of Rule 9(b)). Petitioners themselves apparently did not even read Paragraph 1 to allege what they now contend it means until after the Circuit Court's opinion was issued. Their current argument was never communicated to the District Court. It was not an argument that was made to the Circuit Court in Petitioners' Opening Brief or in their Reply Brief. Nowhere in either of those briefs is Paragraph 1 of the Second Amended Complaint even mentioned. It was only in their Petition for Rehearing to the Circuit Court that Petitioners argued that Paragraph 1 of the Second Amended Complaint should have been considered to allege an ongoing pattern. This was too late, and the Petition for Rehearing was properly denied. *See* Fed. R. App. P. 40(a)(2); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Moreover, even if there were a well-pleaded allegation of a pattern of racketeering activity in the Second Amended Complaint, conducting discovery and successfully trying a lawsuit under the supervision of the District Court of Cleveland County of Oklahoma (which was reviewed on appeal by the Oklahoma Court of Civil Appeals) is not a suitable RICO predicate act, anyway. *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100-1101 (10th Cir. 1999). The issue giving rise to the alleged RICO claim was raised to and disposed of by the District Court of Cleveland County and the Oklahoma Court of Civil Appeals. Dismissal of the RICO claim was

correct. Affirmance of that dismissal was correct. The Petition for Writ of Certiorari should be denied.

III. There Is Nothing About This Case Making It Worthy Of Certiorari Review

The "Questions Presented" in the Petition for Writ of Certiorari make plain that this is not a case worthy of certiorari review. This dispute involves only the parties to this litigation. Petitioners lost at the District Court and lost their appeal by right to the Circuit Court. The decisions were based on application of accepted legal principles, which Petitioners have not challenged. Each respective court's decision is unpublished. There is no reason for the United States Supreme Court to grant discretionary review of the Circuit Court's affirmance.

CONCLUSION

For any of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,
Petitioners,

v.

FARMERS GROUP, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI
QUESTIONS PRESENTED

1. Whether the court properly considered the allegations contained within the complaint *in the light most favorable* to the nonmoving party for purposes of a Fed. Rule of Civ. Proc. R. 12(b)(6) dismissal, when the court clearly ignored paragraphs one through seven (1-7), of the second amended complaint? (Appendix F p. 56a-58a) (Order of 11-20-03 Appendix D p. 16a-20a).

2. Whether the cause of action (and statute of limitations) commenced upon the discovery of the frauds concealed by the third party insurance company; and if not, whether equitable tolling should apply to the state law statute of limitations when a third party successfully concealed the fraud, and as a result, precluded the knowledge of the cause of action against the third party until said discovery?

3. Whether the allegations that, "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint (Appendix F p. 59a-60a and 63a-65a) contained a sufficient allegation of "ongoing pattern or practice" and "open continuity" for purposes of RICO in order to survive a 12(b)(6) Motion to Dismiss?

IN THE

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No. 05-1454

JAMES M. ERIKSON, *et al.*,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Petitioners' Petition for Writ of Certiorari was submitted concerning disagreements with the application of the law concerning the statute of limitations as codified under Oklahoma law 12 O.S. 95, and under the statute of limitations for Civil RICO.

While there is no dispute that Oklahoma does apply a two-year limitation period on many causes of action, Oklahoma law does in fact under Title 12 O.S. 95 extend its two-year period of time, when fraud is involved, with the statute of limitations beginning on the date that the fraud was first discovered. Petitioners believe this short reply addressing both newly discovered evidence (see Para. 9 of Reply), as well as the factual issues misrepresented by the Respondents' initial response was specious.

1) Much of the Respondents' response focuses inaccurately on rehashing the underlying Oklahoma State Court Trial in which Respondents', an insurance company, was never a party.

2) Respondents' response represents their continued effort to try and confuse the Court, by addressing various issues other than the Respondents' fraud, which Petitioners initially discovered August 14, 2000, the rest is non sequitur. See Pg. 8, Para (A) of Petition of Certiorari.

3) Respondents erroneously represented that Para. 1 of Petitioners second amended complaint was raised "too late," and that a pattern of racketeering activity was not alleged. Clearly this conflicts with the record. Appellants' Opening Brief filed of record, with the Tenth Circuit Court of Appeals, spells out Respondents' pattern of racketeering as does Appellants' Petition for Rehearing En Banc (also filed of record at the Tenth Circuit Court of Appeals) which requested review of said facts.

4) Clearly each of these documents reflect that the ongoing pattern was raised, from the very commencement of Petitioners' various appeals, but Respondents' previously successful trickery lured the lower courts into believing a RICO pattern was not raised even though the record clearly reflects exactly the opposite. Respondents apparently believe that misleading statements made are somehow justified. Petitioners object to Respondents' strategy of misrepresentation.

5) Respondents continue to avoid the issue of Petitioner Erikson's discovery of the Respondents' fraudulent letter that was discovered for the first time on August 14, 2000 and ultimately led to discovery of Respondents numerous other letters. In essence Respondents admit to this by their absolute lack of response relating to the discovery of the fraud. The statute of limitations under Oklahoma law commences when fraud is discovered. Therefore Petitioners' initial com-

plaint filed with the district court was filed timely under Oklahoma two-year statute of limitations relating to discovery of fraud. See 12 O.S. § 95(3).

6) Respondents urge the courts to ignore or disregard Oklahoma's express statute of limitations codified at 12 O.S. § 95(3), which specifically states that the statute of limitations commences upon the discovery of fraud which in this case was August 14, 2000. This is the law in Oklahoma.

7) It appears the Respondents are now attempting to raise the RICO four year statute of limitations as a defense; however, **"nearly four years,"** does not reach the four-years statute of limitation for purposes of the Racketeer Influenced and Corrupt Organization Act (RICO). 18 USCA § 1961 *et seq.*

8) Additionally, in Respondents' Motion to Dismiss filed with the district court, the Respondents' did not allege 'lack of pattern,' as a defense; instead, the court raised 'lack of pattern' in its final order. The trial court clearly missed that the pattern was in fact alleged in the first paragraph of the Petitioners' Second Amended Complaint. Had the pattern or lack thereof been at issue in Respondents' Motion to Dismiss, Petitioners would have pointed out paragraph one to the trial court at that time, in contrast to Respondents' averment the same was never raised. Pattern simply was not raised in the Motion to Dismiss; however, as stated, *supra*, same was raised by Petitioners at the Tenth Circuit Court of Appeals.

9) Respondents' represent "that this is a party-specific case of no significance to anybody but the parties to it." (See Pg. 2; Para. 1 Respondents' Response). Respondents' representation is certainly not borne out by the facts. The fraudulent letters Petitioners complained of in their complaint were written in 1998, but Appellants' discovered on or about September 13, 2006 that as late as the year 2003, Respondents were still using and sending out "thousands" of the same fraudulent letters to all medical providers of litigants against them, in order to illegally obtain confidential medical records.

See *Setzer v. Farmers Ins. Co., Inc.*, 2006 WL 1720186 (10th Cir.(Okla) (unpublished). Similar to the case at bar, in *Setzer* the tort-feasor was insured by the Respondent and a state court action was filed for payment of personal injuries. During the discovery phase of the case, Respondents' obtained a limited medical release for "lower back, legs and feet," and no medical records prior to 1991. Instead, Respondents' sent all medical providers a letter which stated [inter alia]:

> "Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills and all other information, including doctor's notes and reports contained in the patient's chart or file. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report."

The similarity of the letters at issue when compared with the letters sent by Respondents to medical providers of Ms. Setzer some five (5) years after the Appellants' case is certainly telling as to Respondents' ongoing fraudulent activities. In *Setzer*, though it was a relatively minor fender bender automobile accident, Respondent insurance company went so far as to even obtain Ms. Setzer's gynecological records which contain confidential medical information which Ms. Setzer's husband did not have knowledge of. This policy is apparently used to harass and intimidate claimants.

The widespread fraudulent activity of the Respondents continues to be and still is a danger to anyone who makes a claim against Respondent insurance company.

In contrast to *Setzer*, in the case at bar the Respondents' in-house attorneys themselves drafted the two (2) separate orders of "Waiver of Medical Privilege," in which Respondents promptly, knowingly and intentionally violated by fraudulent

Appellant Kilgallen and Erikson's medical privileged information by the Respondent using fraudulent letters. In all cases Respondents' perpetrated these frauds in secret and without the knowledge or authority of the victims.

10) It should be noted that in the *Setzer* case, Respondents were sending out similar letters as late as 2003, when the *Setzer* case was before the Tenth Circuit Court of Appeals. This was also the same period that this case was before that Honorable Court (Erikson et. al. Oral Argument was on September 14, 2005, and *Setzer's* Oral Argument was on November 15, 2005.) Even more telling, the same law firm, and at least one of the same attorneys, are in common in these appeals and in their filings in both cases. Yet Respondents' response (Pg. 8, Para. 2) implies this was an isolated incident. ". . . The sending of that one letter to multiple recipients was the sole occurrence of allegedly tortious conduct supporting Petitioners' state law claims and the sole alleged predicate act supporting their RICO claim. . ." This is no isolated incident but a widespread practice of trickery and deception by Respondents. Respondent sent out thousands of similar letters over the years and this must be stopped in the public interest.

11) In addition, Appellants submit that they have pleaded a sufficient number of violations for purposes of establishing a RICO claim (well over the predicate two violations and including some 56 fraudulent letters written by the Respondents to unlawfully obtain via interstate US Mail and Wire medical records protected by privilege and court order) and that they should be allowed to pursue their RICO claims against Appellee. Petitioners should have the opportunity to discover and prove their theory that Respondents' fraudulent activity is an ongoing enterprise which is conducted in secret. Petitioners Complaint did set forth material facts sufficient to provide evidence in support of their claims.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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